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No. 80-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appellee.*

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

GEORGE W. BEATTY
(Counsel of Record)

WILLIAM L. GOLDMAN
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501

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QUESTIONS PRESENTED

1. Whether, under the "unitary business" test laid down by this Court in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* 445 U.S. 425, 100 S.Ct. 1223 (1980), Idaho's inclusion in Appellant's apportionable business income of dividends paid to Appellant by functionally independent subsidiaries contravenes the Due Process Clause of the Fourteenth Admendment to the Constitution of the United States.

2. Whether Idaho's inclusion of interest and capital gains attributable to Appellant's investment in such subsidiaries contravenes the Due Process Clause.

3. Whether Idaho's inclusion of foreign source dividends and interest in apportionable business income contravenes the Commerce Clause of Article I, Section 8 of the Constitution.

4. Whether, if some portion of the dividends, interest or capital gains in issue may constitutionally be included in Appellant's apportionable business income, the Due Process Clause will still be violated unless a correlative adjustment is made to Idaho's apportionment factor.

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v.

IDAHO STATE TAX COMMISSION, *Appellee.*

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

This case is now before this Court for the second time. The second opinion of the Supreme Court of the State of Idaho, from which this appeal is now taken, is unreported. That opinion simply reinstated the initial opinion of the Idaho Supreme Court following a remand from this Court. The initial opinion of the Idaho Supreme Court is reported as *Am. Smelting & Refining* v. *Idaho St. Tax Com'n*, 99 Idaho 924, 592 P.2d 39

(1979). Included as Appendix A, *infra,* are copies of: the second opinion of the Idaho Supreme Court on remand from this Court (App. A, *infra,* pp. 1a-2a); the order of this Court[1] vacating the first judgment of the Idaho Supreme Court and remanding the case for further consideration (App. A, *infra,* p. 3a); the first opinion of the Idaho Supreme Court (App. A, *infra,* pp. 4a-35a); the unreported Memorandum of the District Court of the Fourth Judicial District of the State of Idaho, Ada County (the "State District Court") (App. A, *infra,* pp. 36a-37a); the unreported Findings and Conclusions of the State District Court (App. A, *infra,* pp. 38a-45a); and the unreported Decision of the Idaho State Tax Commission (App. A, *infra,* pp. 46a-62a).

JURISDICTION

This proceeding involves the application of Idaho's corporate income tax statute. Appellant challenged the deficiencies asserted by the Idaho State Tax Commission on both statutory and constitutional grounds.[2]

Appellant's statutory arguments were upheld by the State District Court (App. A, *infra,* pp. 36a-37a, 44a-45a) and, accordingly, that court did not reach the constitutional issues. In its first opinion on March 12, 1979, the Idaho Supreme Court reversed and held that certain dividends and other income from intangibles were includable in Appellant's apportionable "business income" and, therefore, subject to tax in Idaho. (App. A, *infra,* pp. 19a-26a) In reversing the lower court with respect to the business income issue, the Idaho Supreme Court first rejected Appellant's statutory interpretation

[1] This Court's order is reported as *ASARCO Inc.* v. *Idaho State Tax Comm'n,* 445 U.S. 939, 100 S.Ct. 1333 (1980).

[2] Appellant raised the Federal constitutional issues on page 4 of its protest filed with the Idaho State Tax Commission, in paragraphs 3 and 4 of its Complaint filed in the State District Court and on pages 18-24 of the initial brief which it filed as Appellee in the Idaho Supreme Court.

and then upheld the statute against Appellant's constitutional challenge. (App. A, *infra,* pp. 26a-33a) The Idaho Supreme Court then remanded the case to the Idaho State District Court for further proceedings and computations unrelated to the constitutional issues presented here. Included in Appendix B, *infra,* is a copy of the Remittitur, dated April 3, 1979. (App. B, *infra,* p. 63a)

On June 8, 1979, Appellant appealed to this Court from the Idaho Supreme Court by filing its Jurisdictional Statement (Sup. Ct. Docket No. 78-1839). On March 24, 1980, this Court entered its order vacating the judgment of the Idaho Supreme Court and remanding the case "for further consideration in light of *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, ante,* p. 425." (App. A, *infra,* p. 3a) On March 4, 1981, however, the Idaho Supreme Court responded by simply filing a single paragraph, *per curiam* opinion reinstating its initial opinion of March 12, 1979. (App. A, *infra,* pp. 1a-2a) Accordingly, the Idaho Supreme Court then entered its second Remittitur, dated March 26, 1981, remanding the case to the State District Court for further proceedings. (App. B, *infra,* p. 64a)

Included in Appendix C, *infra,* is a copy of the Notice of Appeal which Appellant filed in the Idaho Supreme Court on May 18, 1981.[3] (App. C, *infra,* p. 65a) This Jurisdictional Statement is being filed within 90 days of March 4, 1981, the date on which the Idaho Supreme Court rendered its second decision upholding the constitutionality of the Idaho taxing statute as applied to Appellant. Accordingly, this Court has jurisdiction under 28 U.S.C. §1257(2). *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* 445 U.S. 425, 100 S.Ct. 1223 (1980); *Moorman Mfg. Co.* v. *Bair,* 437 U.S. 267 (1978).

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[3] Appellant also filed a copy of the Notice of Appeal in the State District Court on May 18, 1981. (App. C, *infra,* p. 66a)

STATUTE INVOLVED

Section 63-3027 of the Idaho Code is set forth in Appendix D, *infra.*

STATEMENT OF THE CASE

ASARCO Incorporated, the Appellant, is engaged in the business of mining, smelting, refining and selling non-ferrous metals. Appellant is incorporated in New Jersey, maintains its headquarters or "commercial domicile" in New York, and conducts business in a number of other states, including Idaho. Appellant's principal business in Idaho is mining silver. In addition, Appellant mines lead and zinc, operates the administrative office for its northwest mining division, and sells small amounts of secondary metals in Idaho. Appellant's smelting, refining and other activities are conducted elsewhere. (App. A, *infra,* pp. 39a-41a; Stip. ¶ ¶ 12, 14)[4]

During the years in issue, 1968 through 1970, Appellant received sizeable dividends from General Cable Corporation ("General Cable"), Revere Copper and Brass, Incorporated ("Revere"), M.I.M. Holdings, Ltd. ("M.I.M."), ASARCO Mexicana, S.A. ("Mexicana") and Southern Peru Copper Corporation ("Southern Peru"). Appellant also received interest on Revere's convertible debentures, on a note received in connection with a prior sale of Mexicana stock, and on a note received in connection with a sale of General Cable stock. In addition to the capital gain which Appellant realized on the General Cable stock sale, Appellant realized capital gains in 1968 and 1969 on the sale of a

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[4] "Stip." references are to the Stipulation filed in the State District Court proceeding.

small part of its M.I.M. stock. Appellant also received other income from intangibles during the years in issue. However, for purposes of this appeal, Appellant is limiting its constitutional challenge to the treatment given by the Idaho State Tax Commission to the foregoing dividends, interest and capital gains.[5]

General Cable and Revere are engaged in the metal fabricating business which is a business not conducted by Appellant. During the taxable years here involved, Appellant owned approximately 35% of the stock of these corporations, but Appellant had no representatives on their Boards of Directors, no common directors, and no common officers. An antitrust decree prohibited Appellant from even voting its stock in these corporations. While both companies purchased substantial amounts of copper from Appellant, the antitrust decree expressly prohibited Appellant from selling copper to them at prices lower than those quoted to competitors. During 1970, Appellant was compelled by the antitrust decree to sell its General Cable stock. Following the stock sale, Appellant continued to sell copper to General Cable on the same basis as it did prior to the stock sale. (App. A, *infra,* pp. 8a-9a; Stip. ¶ ¶ 4-7, 10; Tr. 73-76)[6]

M.I.M. is a major corporation engaged in mining, milling, smelting and refining. It does business both in Australia and in England. During the years in issue, Appellant owned approximately 53% of M.I.M., with the balance of the stock being widely held. Appellant has no representatives on the M.I.M. Board of Directors, no

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[5] A schedule of Appellant's dividends, interest income and capital gains during the years in issue, taken from ¶ 11 of the Stipulation, is set forth in Appendix E, *infra.*

[6] "Tr." references are to the Reporter's Transcript of the State District Court proceeding.

common directors, and no common officers. In addition, there are no significant business transactions between the two corporations. M.I.M. operates with total independence and Appellant has not participated in any of its activities. (App. A, *infra*, pp. 8a, 43a; Stip. ¶ ¶ 4-7, 10; Tr. 69-73)

During the years involved, Appellant owned 49% of the stock of Mexicana. Mexican law prohibits the ownership of any greater percentage. Appellant does not control Mexicana or dictate its policy; Mexicana acts independently of Appellant. There are no common officers of the two companies. While Mexicana is engaged in the same general line of business as Appellant, the only intercompany sales between the two corporations are occasional spot purchases of concentrates by Appellant from Mexicana. Appellant also performs some miscellaneous services for Mexicana, but Appellant is compensated for these services on an arm's length basis. (App. A, *infra*, pp. 9a-10a, 43a; Stip. ¶ ¶ 4-7, 10; Tr. 65-69)

Appellant owns 51.5% of the stock of Southern Peru, but, pursuant to the terms of an agreement with the other shareholders of Southern Peru, Appellant cannot exercise control of the corporation. Under the agreement, which is incorporated in Southern Peru's by-laws, Appellant can appoint only six of the thirteen directors. Approximately 35% of the copper produced by Southern Peru is sold to Appellant. The remaining production is sold to various buyers, 30% to buyers in Europe and the balance to the other shareholders. All of the sales are made at arm's length prices. Southern Peru has its own operating staff and Appellant receives a fee for the incidental technical services which it provides. (App. A, *infra*, pp. 7a-8a, 43a; Stip. ¶ ¶ 4-7, 10; Tr. 55-64)

In almost all instances, the parties stipulated that the corporations paying the dividends made no sales or purchases in Idaho, had no representatives or agents in Idaho, and conducted no business activity in Idaho during the years in issue. (Stip. ¶ 9(a)) In a few instances, no information was available with respect to the sales and business activities of the payor corporations in Idaho. (Stip. ¶ 9(b)) There was no evidence or assertion, however, that any of the corporations did conduct business in Idaho.

In filing its Idaho tax return for 1969 and 1970, Appellant apportioned its operating business income between sources within and without Idaho on the basis of the three-factor formula prescribed pursuant to Idaho Code §63-3027. (See App. D, *infra*, pp. 71a-73a)[7] This three-factor formula attributed to Idaho that fraction of Appellant's total "business income" which was the average of the fractions of Appellant's total tangible property, payroll, and sales attributable to Idaho. Appellant believed that all of its dividend, interest and capital gain income in issue constituted non-business income.[8] Accordingly, instead of including these amounts in its apportionable business income, Appellant allocated them to New York, its commercial domicile, pursuant to Idaho Code §63-3027(f)(3) and (g). (App. D, *infra*, pp. 69a-70a) As a result, Appellant's Idaho taxable income for 1969 and 1970 was reported as $419,876 and $127,775, respectively. (Tr. 130)

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[7] For 1968, Appellant reported its Idaho tax using a separate accounting, rather than an apportionment, method. (Stip. ¶ 3)

[8] Appellant also treated its other income from intangibles as non-business income. This treatment was part of a compromise reached in 1970 whereby Appellant agreed to apportion its business income rather than use separate accounting. (Stip. ¶ 3) However, Appellant has not appealed with respect to these other items.

On audit, the Idaho State Tax Commission determined that all of Appellant's dividend, interest and capital gain income was includable in its apportionable business income. Because of the large amounts involved (see Appendix E, *infra*), this adjustment increased Appellant's Idaho taxable income to $2,274,750 in 1969 and $2,162,340 in 1970. (App. A, *infra*, p. 39a)

Appellant challenged the inclusion of the dividend, interest and capital gain income in its apportionable business income on both statutory and constitutional grounds. The Idaho State Tax Commission rejected both of these challenges. (App. A, *infra*, pp. 53a-61a) As indicated above, the State District Court upheld Appellant's statutory argument without reaching the constitutional issues. (App. A, *infra*, pp. 36a-37a, 44a-45a) The Idaho Supreme Court reversed, however, rejecting most of Appellant's statutory arguments (App. A, *infra*, pp. 12a-26a) and all of its constitutional arguments. (App. A, *infra*, pp. 26a-33a)[9] Appellant appealed to this Court which vacated the judgment of the Idaho Supreme Court and remanded the case "for further consideration in light of" *Mobil*. (App. A, *infra*, p. 3a) On remand, however, the Idaho Supreme Court simply reinstated its first opinion. (App. A, *infra*, pp. 1a-2a) Accordingly, Appellant appeals for the second time to this Court.

REASONS FOR NOTING JURISDICTION

This case involves substantial constitutional issues left unresolved by this Court's decisions in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, supra*, and

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[9] The Idaho Supreme Court did hold that a small portion of Appellant's dividend income constituted non-business income which was not subject to apportionment under the Idaho Code. (App. A, *infra*, p. 23a)

Exxon Corp. v. *Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S.Ct. 2109 (1980). First, there is a need to resolve a conflict among the states and to clarify the constitutional limits of the "unitary business" test in *Mobil*. In addition, Appellant's alternative contention concerning the constitutional requirement for some adjustment to the apportionment factor in a case such as this was specifically identified and deliberately left unresolved by this Court in *Mobil*.

On remand, the Idaho Supreme Court simply reinstated its initial opinion in this case without any further discussion of the issues. (App. A, *infra*, pp. 1a-2a) Thus, there is a need for this Court to now do what the Idaho Supreme Court failed to do on remand — that is, to analyze and discuss the issues "in light of" *Mobil*.

The constitutional issues presented here are essentially the same as those presented in *F. W. Woolworth Co.* v. *Taxation and Revenue Department of the State of New Mexico*, 624 P.2d 28 (N.M. 1981), which was appealed to this Court on April 17, 1981 (Sup. Ct. Docket No. 80-1745).[10] It is plain that these issues are of great

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[10] *Woolworth* presents one issue not present here — namely, the constitutionality of New Mexico's inclusion in Woolworth's apportionable business income of an amount equal to the "deemed paid" foreign tax credit allowed by the Federal Government with respect to certain dividend income. This case involves one issue not present in *Woolworth* — namely, the constitutionality of Idaho's treatment of Appellant's interest and capital gains income; only dividend income is involved in *Woolworth*. Aside from these differences, however, the other constitutional issues presented in the two cases are the same.

Two of the counsel for Appellant in this case also are counsel for F. W. Woolworth Co. in its appeal to this Court. Accordingly,

importance and arise in every state which, as a nondomiciliary state, seeks to tax a resident[11] corporation on dividends, interest and capital gains attributable to investments in functionally independent corporations operating entirely outside the taxing state.[12]

(1) Under the "Unitary Business" Test Laid Down by this Court in *Mobil*, Idaho's Inclusion of the Dividends in Issue in Appellant's Apportionable Business Income Contravenes the Due Process Clause.

In *Mobil* this Court was confronted with the question of whether, under the Due Process Clause, a nondomiciliary state (Vermont) could constitutionally tax (by inclusion in apportionable income) certain dividends received by a resident corporation (Mobil) from other nonresident corporations having no contact with the taxing state. The Court upheld the constitutionality of the Vermont tax as applied to Mobil, stating (445 U.S. at 439-440):

> "[T]he linchpin of apportionability in the field of state income taxation is the unitary business principle. In accord with this principle, what appellant

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since the issues in the two cases are essentially the same, portions of the two Jurisdictional Statements, where appropriate, also are the same.

[11] As used hereinafter, the term "resident" corporation means a corporation which is doing business within the taxing state, but is organized under the laws of some other state and has its headquarters or commercial domicile in some other state.

[12] The states asserting jurisdiction to tax dividends, and the relevant statutory provisions, are listed in Appendix F to Mobil's Jurisdictional Statement. According to that Appendix, at least 26 states and the District of Columbia assert taxing jurisdiction in cases such as this, and the potential tax revenues are enormous. For the convenience of the Court, Appendix F to Mobil's Jurisdictional Statement is reproduced in Appendix F, *infra*.

must show, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State. *Bass, Ratcliff & Gretton* [266 U.S. 271 (1924)] forecloses the contention that the foreign source of the dividend income alone suffices for this purpose. Moreover, *appellant has made no effort to demonstrate that the foreign operations of its subsidiaries and affiliates are distinct in any business or economic sense from its petroleum sales activities in Vermont.* Indeed, all indications in the record are to the contrary, *since it appears that these foreign activities are part of appellant's integrated petroleum enterprise* . . . Vermont was entitled to conclude that the dividend income's foreign source did not destroy the requisite nexus with instate activities."

* * *

"Nor do we find particularly persuasive Mobil's attempt to identify a separate business in its holding company function. *So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.*" [Footnotes deleted; emphasis supplied]

We think it plain that the test adopted by this Court in *Mobil* is whether the "underlying activity" — that is, the business of the dividend paying corporation — is part of a "functionally integrated enterprise" being conducted, in part, by the resident corporation in the taxing state. The issue, after all, is to determine that portion of the resident corporation's business income which is attributable to its activities in the taxing state. Unless the business of a dividend paying corporation is functionally

integrated and coordinated with the operations of the resident corporation in the taxing state, there is no reason to treat the dividends as part of the resident corporation's "unitary business" income.

Appellant's interpretation of the "unitary business" test in *Mobil* is consistent with a number of prior state court decisions. See, e.g., *Square D Co.* v. *Kentucky Board of Tax Appeals*, 415 S.W.2d 594 (Ky. 1967) and *Gulf Oil Corp.* v. *Clayton*, 267 N.C. 15, 147 S.E.2d 522 (1966). In both cases, because the business operations of a parent and subsidiary were not integrated, the businesses were not treated as parts of a "unitary" enterprise even though there was common ownership and both corporations were engaged in the same line of business. See also *American Bakeries Co.* v. *Johnson*, 259 N.C. 419, 131 S.E.2d 1 (1963).[13]

The decision below is in direct conflict with the foregoing authorities. The Idaho Supreme Court has held that dividend income received by a resident corporation from a nonresident corporation may constitutionally be taxed by a nondomiciliary state if the resident

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[13] Similarly, where two businesses of a single corporation are not functionally integrated, the two businesses do not constitute a single unitary business. See, *e.g.*, this Court's opinion in *Exxon Corp.* v. *Wisconsin Dept. of Revenue, supra.* In that case, income derived from the sale of crude oil and gas to third parties at the wellhead was excluded from the apportionable income of Exxon's unitary petroleum business. See also *Commonwealth* v. *Advance-Wilson Industries, Inc.*, 317 A.2d 642 (Pa. 1974), where a single corporation conducted two different businesses, a ceramic tile business and an electrolyzing business, which were held to be separate businesses. It did not matter that both businesses were conducted as divisions of the same corporation so that there was common ownership and control, or that the home office performed certain administrative and other functions for both divisions.

corporation owns a "controlling" stock interest in the nonresident corporation, and both corporations are engaged in "virtually the same business". (App. A, *infra*, pp. 22a-23a) The decision below would permit such dividends to be taxed even though: (1) the recipient corporation admittedly "did not exercise its right to control" the payor corporation; (2) the payor corporation "operated independently of" the recipient corporation; and (3) the two corporations "did little if any business" with each other. (App. A, *infra*, p. 22a)

The admission by the court below that Appellant and M.I.M. "operated independently" of each other should be dispositive of the constitutional issue. The dividends Appellant received from M.I.M. are not properly taxable in Idaho because the independent operations of the two companies are the antithesis of a "unitary business", which is the "linchpin of apportionability". (445 U.S. at 439) It is equally clear that the dividends which Appellant received from the other payor corporations were not "profits derived from a functionally integrated enterprise".(445 U.S. at 440) For example, Appellant was prevented by an anti-trust decree from exercising any degree of control over General Cable and Revere or selling copper to them at prices lower than those quoted to competitors. Revere and General Cable were not even in the same line of business as Appellant; they were *fabricators* of metal products and did no mining, smelting or refining as Appellant did. (App. A, *infra*, p. 8a) With respect to the two remaining corporations, Mexicana and Southern Peru, the State District Court made uncontradicted findings of fact that Appellant did not control either of these corporations, and that both of them "operate[d] independently of" Appellant. (App. A, *infra*, p. 43a)

The Idaho Supreme Court reached the wrong result in this case because it based its constitutional decision on

the state statutory test for defining "business income" rather than the "functional integration" test prescribed by this Court in *Mobil*. (App. A, *infra*, p. 28a) Regardless of the facts which led the Idaho Supreme Court to conclude that the state statutory test was satisfied (e.g., ownership of stock or conduct of the same type of business), the evidence of record provides no basis for concluding that the separate and distinct constitutional test also was satisfied.

It is important for this Court to resolve the conflict among the states and to clarify the constitutional limits of the "unitary business" concept. Furthermore, the appeals in this case and in *Woolworth* present a variety of factual circumstances which could offer this Court an ample opportunity to fully consider and clarify the unitary business test of *Mobil*.

(2) Idaho's Inclusion of the Interest and Capital Gains in Issue in Appellant's Apportionable Business Income Contravenes the Due Process Clause.

Mobil involved only dividend income; the present case also involves interest income and capital gains attributable to Appellant's investments in the dividend paying corporations. See Appendix E, *infra*. There are many cases in which state courts have considered whether a resident corporation's interest income or capital gains from intangibles are sufficiently related to the corporation's activities within the taxing state to justify apportionment. See, e.g., *Qualls* v. *Montgomery Ward & Co., Inc.*, 266 Ark 207, 585 S.W.2d 18 (1979); *Atlantic Richfield Co.* v. *State*, 601 P.2d 628 (Colo. 1979); *Champion International Corp.* v. *Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (1975); *Sperry and Hutchinson Co.* v. *Department of Revenue*, 270 Ore. 329, 527 P.2d 729 (1974); *Commonwealth* v. *ACF*

Industries, Inc., 441 Pa. 129, 271 A.2d 273 (1970); and *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 129 N.E. 202 (1920). By noting jurisdiction, this Court has the opportunity to consider this question and determine whether the test to be applied with respect to dividends also applies equally to interest and capital gains attributable to investments in the dividend paying corporations.

Appellant contends that the result under the Due Process Clause should be the same since, in each instance, Idaho is making the same impermissible attempt to tax "extraterritorial values." *Butler Bros.* v. *McColgan*, 315 U.S. 501, 507 (1942). Appellant's interest income and capital gains in issue were no more related to Appellant's business conducted in Idaho than were Appellant's dividend income from those same corporations.

(3) Apportionment of Appellant's Foreign Source Dividend and Interest Income Also Contravenes the Commerce Clause.

Mobil also involved the application of the Commerce Clause. Mobil argued that (445 U.S. at 442):

> ". . . Vermont's tax imposes a burden on interstate and foreign commerce by subjecting [Mobil's] dividend income to a substantial risk of multiple taxation."

Mobil premised this "multiple taxation" argument on the assumption that all of its dividend income was fully taxable in the state of commercial domicile and, therefore, any apportionment to Vermont unavoidably subjected Mobil to the risk of multiple taxation at the state level. In deciding the Commerce Clause issue against Mobil, this Court rejected the premise for Mobil's argument. That is, the Court rejected Mobil's assumption that the dividends would necessarily be subject to tax in the state of commercial domicile.

Appellant's "multiple taxation" argument goes beyond Mobil's and, therefore, was not dealt with by this Court. Mobil's argument centered on the "risk" of multiple taxation by both the state of commercial domicile and another nondomiciliary state. Here, however, the foreign source dividends and interest were *actually* subject to foreign withholding taxes.[14] In such a case, *any* state taxation (even by the state of commercial domicile) "creates more than the *risk* of multiple taxation; it creates multiple taxation in fact". *Japan Line Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813 (1979).

(4) If Some Portion of the Dividends, Interest and Capital Gains in Issue May Constitutionally Be Included in Appellant's Apportionable Business Income, the Due Process Clause Will Still Be Violated Unless a Correlative Adjustment Is Made to Idaho's Apportionment Factor.

As noted above, this issue was deliberately and explicitly left unresolved in *Mobil.* On three separate occasions, the majority opinion states that the issue was not considered because Mobil did not raise it. See 445 U.S. at 434, 441, n. 15 and 449. Mr. Justice Stevens' dissent

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[14] Appellant was subject to Mexican and Australian withholding taxes on the dividends it received from Mexicana and M.I.M., respectively. The Income Tax Law of Mexico (Articles 60, V and 73, I) subjected such dividends to a tax which was imposed on the recipient (Article 61), but was withheld by the payor (Article 74). Similarly, Australia imposed a withholding tax (Income Tax Assessment Act, 1936-1973, Secs. 128A and 128B) on dividend payments by resident companies to nonresidents, and required the payor company to withhold the tax before the dividend was paid (Income Tax Assessment Act, 1936-1973, Sec. 221, YL). See also the Income Tax Law of Mexico, Article 65 with respect to the interest on the notes received by Appellant in connection with the sale of its Mexicana stock.

in *Mobil* makes it clear, however, that he would require an adjustment to the apportionment factor in a case like this. In this regard, his dissent states (445 U.S. at 461):

> "Unless the sales, payroll and property values connected with the production of income by the [dividend] payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will *inevitably* cause Mobil's Vermont income to be overstated." [Emphasis supplied]

The reason for Mr. Justice Stevens' conclusion is clear. A nondomiciliary state can properly tax a resident corporation only on that portion of its income which is attributable to its activities in the nondomiciliary state. In determining that amount, it should make no difference whether the corporation's unitary business is conducted through operating divisions or separately incorporated subsidiaries. As this Court stated in *Mobil* (445 U.S. at 440-441):

> "Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441, 84 S.Ct. 1564, 1568, 12 L.Ed.2d 430 (1964). *Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.*" [Emphasis supplied]

The results of operating a taxpayer's unitary business through a subsidiary will *not* be the same,

however, as the results of operating through a division unless the taxpayer's apportionment factor is appropriately adjusted when dividends paid by the subsidiary are included in apportionable business income.[15]

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[15] This can be demonstrated by assuming that the taxpayer conducts a unitary business through two divisions (Division A, which operates both inside and outside Idaho, and Division B, which operates entirely outside Idaho). Assume the following figures:

	Division A		Division B	
	All Locations	Idaho Situs	All Locations	Idaho Situs
Property	$200,000	$20,000	$100,000	-0-
Sales	400,000	40,000	200,000	-0-
Payroll	200,000	20,000	100,000	-0-
Business Income	$ 20,000		$ 10,000	

On these facts, the income apportionable to Idaho would be $2,000 computed as follows:

Total Business Income $30,000

Idaho Factors:

$$\left[\frac{\text{Property } 20{,}000}{300{,}000} + \frac{\text{Sales } 40{,}000}{600{,}000} + \frac{\text{Payroll } 20{,}000}{300{,}000}\right] \div 3 = 6\ 2/3\%$$

Idaho Taxable Income = $30,000 x .06 2/3 = $2,000

However, if the business of Division B were operated through a wholly-owned subsidiary corporation, and all income of the subsidiary were distributed as a dividend to the parent and treated as apportionable business income without any adjustment in the parent's apportionment factor, the income apportioned to Idaho would be increased by 50% to $3,000, computed as follows:

Parent's Business Income = $20,000 + 10,000 = $30,000

Parent's Idaho Factors:

$$\left[\frac{\text{Property } 20{,}000}{200{,}000} + \frac{\text{Sales } 40{,}000}{400{,}000} + \frac{\text{Payroll } 20{,}000}{200{,}000}\right] \div 3 = 10\%$$

Idaho Taxable Income = $30,000 x .10 = $3,000

Thus, unless the taxpayer's apportionment factor is adjusted when dividends are included in apportionable business income (in order to reflect the subsidiary's payroll, sales and property which generated the dividends), the result will inevitably violate the Due Process Clause by apportioning too much income to the taxing state.[16] *Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission*, 390 U.S. 317 (1968); *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931); *People ex rel. Alpha Portland Cement Co.* v. *Knapp, supra.*

Absent any appropriate adjustment to the apportionment factor, the nondomiciliary state will, in effect, be taxing directly a portion of the subsidiary's income — all of which was earned by activities conducted outside the nondomiciliary state. Such taxation of "extraterritorial values" is far different from taking the subsidiary's dividends into account, as part of the overall apportionment procedure, for the purpose of determining the parent corporation's income from its activities conducted within the taxing state. *Butler Bros.* v. *McColgan, supra.*

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[16] In this case, for example, Idaho's inclusion of the dividends, interest and capital gains in issue in Appellant's apportionable business income for 1969 and 1970, coupled with Idaho's failure to adjust appropriately the apportionment factor, caused Appellant's Idaho taxable income to be increased from $419,876 to $2,274,750 in 1969 and from $127,775 to $2,162,340 in 1970. (App. A, *infra*, p. 39a; Tr. 130)

The Idaho State Tax Commission did include the amount of Appellant's dividend income in the denominator of the sales fraction. But this token adjustment was plainly inadequate to reflect the subsidiaries' underlying sales, assets and payroll which produced the distributed income and which clearly would have been taken into account had the businesses been run in a division of Appellant rather than in subsidiaries.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of the appeal.

Respectfully submitted,

GEORGE W. BEATTY
(Counsel of Record)

WILLIAM L. GOLDMAN
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501

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APPENDIX A

1981 Opinion No. 15

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12198

Boise term, January 1981

Filed: March 4, 1981

R.H. Young, Clerk

AMERICAN SMELTING & REFINING CO., *Plaintiff-respondent,*

v.

IDAHO STATE TAX COMMISSION, *Defendant-appellant.*

On remand from the United States Supreme Court.

Prior opinion and order of this Court are *reinstated.*

David Leroy, Attorney General, Theodore V. Spangler, Jr., Deputy Attorney General; for State Tax Commission, Boise, Idaho, for appellant.

Philip E. Peterson, Lewiston, Idaho, and George Beatty, of Lee, Toomey & Kent, Washington, D.C., for respondent American Smelting & Refining Co.

William D. Dexter, Olympia, Washington, for amicus curiae Multistate Tax Commission.

Tyrone Fahner, Attorney General of Illinois, Chicago, Illinois, for amicus curiae State of Illinois.

PER CURIAM:

The order of this Court in *American Smelting & Refining Co.* v. *Idaho State Tax Commission,* 99 Idaho 924, 592 P.2d 39 (1979), was vacated by the United States Supreme Court in *ASARCO, Inc.* v. *Idaho State Tax Commission,* 445 U.S. _____, 100 S.Ct. 1333 (1980), and remanded for further consideration in light of the decision of the United States Supreme Court in *Mobil Oil Corp.* v. *Comm'r of Taxes of Vermont,* 445 U.S. _____, 100 S.Ct. 1223 (1980). The case having been rebriefed and reargued, it is the conclusion of this Court that our prior opinion and order are consistent with both *Mobil Oil* and the more recent decision in *Exxon*

Corp. v. *Wisconsin Dept. of Revenue*, 445 U.S. _____, 100 S.Ct. 2109 (1980). The opinion and order in *American Smelting & Refining Co.* v. *Idaho State Tax Commission*, 99 Idaho 924, 592 P.2d 39 (1979), are hereby reinstated.

MARCH 24, 1980

Vacated and Remanded on Appeal

No. 78-1839. ASARCO INC. (FORMERLY AMERICAN SMELTING & REFINING CO.) *v.* IDAHO STATE TAX COMMISSION. Appeal from Sup. Ct. Idaho. Judgment vacated and case remanded for further consideration in light of *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, ante*, p. 425. Reported below: 99 Idaho 924, 592 P. 2d 39.

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12198

Boise term, December 1977

Filed: March 12, 1979

AMERICAN SMELTING & REFINING CO., *Plaintiff-respondent,*

v.

IDAHO STATE TAX COMMISSION, *Defendant-appellant.*

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Marion J. Callister, District Judge.

Appeal from apportionment of income for Idaho state income tax purposes. *Reversed and remanded.*

David Leroy, Attorney General; Theodore V. Spangler, Jr., Deputy Attorney General for State Tax Commission, Boise, Idaho, for appellant.

Philip E. Peterson, Lewiston, Idaho; R. Michael Southcombe, of Clemons, Cosho & Humphrey, Boise, Idaho; and George Beatty, of Lee, Toomey & Kent, Washington, D.C., for respondent.

William D. Dexter, Olympia, Washington, for amicus curiae Multistate Tax Commission.

Dale G. Higer, of Eberle, Berlin, Kading, Turnbow & Gillespie, Boise, Idaho, for amicus curiae United States Steel Corporation.

BAKES, J.

This appeal involves state income tax deficiencies assessed against the plaintiff respondent American Smelting

and Refining Company (ASARCO) by the defendant appellant Idaho State Tax Commission (Commission). The principal issues concern the apportionment of ASARCO's income from tangible and intangible property as "business income" under the Idaho version of the Uniform Division of Income for Tax Purposes Act (UDITPA).

I

THE FACTUAL BACKGROUND

In 1965 Idaho adopted with slight modification the Uniform Division of Income for Tax Purposes Act (UDITPA). I.C. § 63-3027. The Act contains rules for determining the portion of a corporation's total income from a multistate business which is attributable to this state and therefore subject to Idaho's income tax. In general, UDITPA divides a multistate corporation's income into two groups: business income and non-business income. Business income is apportioned according to a three factor formula, I.C. § 63-3027(i), while non-business income is allocated to a specific jurisdiction. I.C. § 63-3027(d)-(h). Idaho modified UDITPA to provide that "a parent and subsidiary corporation may, when necessary to accurately reflect income, be considered a single corporation." I.C. § 63-3027(s).

ASARCO is a multistate-multinational corporation primarily engaged in mining, smelting and refining nonferrous metals. ASARCO owns stock in several domestic and foreign corporations, most of which are engaged in similar or related operations. ASARCO's commercial domicile is in New York. Its Idaho activities include the operation of two mines, the Page Lead Zinc Mine and the Galena Silver Mine, and the location of its northwest mining department headquarters in Wallace, Idaho. ASARCO also sells in Idaho small amounts of secondary metals—metals reclaimed from scrap metal.

In 1971 the Multistate Tax Commission (MTC) completed a joint audit of ASARCO on behalf of Idaho and five other states. The MTC is the administrative agency of the Multistate Tax Compact, of which Idaho is a member. I.C. § 63-3701. Article VIII of the compact authorizes the MTC to perform interstate audits on behalf of member states. Idaho statutes specifically authorize the Idaho State Tax Commission to participate in such joint audits. I.C. § 63-3707. The constitutionality of the Multistate Tax Compact, including its joint audit provisions, has been upheld. United States Steel Corp. v. Multistate Tax Comm'n, —— U.S. ——, 98 S.Ct. 799 (1978); Kinnear v. Hertz Corp., 545 P.2d 1186 (Wash. 1976).

The MTC auditor made several significant adjustments in the computation of ASARCO's Idaho tax returns for the years of 1968, 1969 and 1970. These adjustments, which were accepted by the Idaho State Tax Commission, resulted in the tax deficiencies at issue in this case. These adjustments may be summarized as follows.

The MTC auditor combined or "unitized" with ASARCO, pursuant to I.C. § 63-3027(s), six corporations—all wholly owned subsidiaries of ASARCO.[1] Because these corporations were unitized with ASARCO, their incomes were combined with ASARCO's for Idaho tax purposes. However, dividends paid by the six corporations to ASARCO were not considered as income to ASARCO but were viewed by the auditor as intracompany transfers.

The MTC auditor also made significant changes in the computation of ASARCO's "business income," which was subject to apportionment. I.C. § 63-3027(i). These changes are best summarized in terms of the type of income involved.

---

[1] The "unitized" corporations were: Federal Metals of Canada; ASARCO Mercantile Co.; Enthone, Inc.; International Metal Co.; Lone Star Lead Construction Co.; and Northern Peru Mining Co.

Dividend Income: From a monetary standpoint, this is the most significant of the disputed items of income. The MTC auditor included as business income dividends paid ASARCO by various corporations, other than the six "unitized" corporations. The dividends from these "non-unitized" corporations totaled $48,310,126.00 in 1968, $66,374,-428.00 in 1969, and $61,772,970.00 in 1970. This dividend income represented a substantial portion of ASARCO's total income for the tax years in question. Summarized below are the activities of the principal corporations which paid ASARCO these dividends and their relationship to ASARCO.

1. Southern Peru Copper Corporation: This corporation produces blister copper, a material which is 99% copper and also contains byproduct material such as gold, silver and florium. ASARCO owns 51.5% of the stock and the remainder is owned by three other mining companies. Pursuant to a management agreement, ASARCO is entitled to elect a plurality but not a majority of the directors. Southern Peru has its own staff, but ASARCO provides certain technical assistance such as purchasing, traffic and tax preparation services. ASARCO receives a negotiated fee for these services.

Approximately 30% of Southern Peru's blister copper is sold to European customers through Southern Peru Copper Sales Corporation. The stock ownership in this sales corporation is the same as in Southern Peru. However, it is staffed entirely by ASARCO employees. The European sales are made through the sales corporation in order to preserve Southern Peru's favored federal tax status as a Western Hemisphere Trading Corporation. The remainder of Southern Peru's blister copper is divided among the four stockholders according to their ownership, *e.g.*, ASARCO receives 51.5% of the remainder. The price for the copper is determined by reference to a quotation in a trade publication, and during the years in

question ASARCO's purchases from Southern Peru were substantial. This output contract with Southern Peru is important to ASARCO but is not essential to its smelting business.

2. M.I.M. Holdings, Ltd.: This is a major corporation engaged in the mining, milling, smelting and refining of copper, lead, zinc and silver in Australia and which also operates a lead and zinc refinery in England. Hence, it is involved in virtually the same business as ASARCO. ASARCO owns 52.7% of the stock, and the rest is widely held. However, ASARCO has no directors or officers in M.I.M. At trial an ASARCO executive explained its failure to elect any directors as follows:

> "This company has been very successful in staffing the corporation with Australian people and [they have] been able to run this company by themselves and, therefore, in consequence of the nationalistic feeling which develops in most of such developing countries we have not exercised any right we might have to elect a director to the board of the company."

M.I.M. uses an ASARCO furnace patent, for which it pays a royalty, and occasionally ASARCO provides it some technical services. It is not economically feasible to ship ore or concentrates from Australia to the United States for smelting and there is only an insignificant amount of sales between these two corporations. In general, M.I.M. operates independently of ASARCO.

3. General Cable and Revere Copper: These two copper fabricators are major customers of ASARCO and ASARCO owned approximately 34% of the stock in each corporation. The remaining stock was widely held. Revere Copper also uses an ASARCO patent, for which it pays royalties, and both companies utilize ASARCO's stock transfer department, for which they pay a fee. In 1961 the United States Department of Justice filed an antitrust

action against ASARCO because of its interest in General Cable and Revere Copper. The action resulted in consent decrees signed in 1967 which prohibited ASARCO from maintaining common officers in these companies, voting its stock, selling these companies copper at prices lower than those quoted their competitors, and acquiring stock in any other copper fabricator. In 1970 ASARCO was compelled to divest itself of its stock in General Cable. Following the divestiture, General Cable continued to be a major customer of ASARCO.

4. Lake Asbestos of Quebec, Ltd.: This company mines and processes asbestos fibers in Canada. Its products are sold throughout the world, and in order to preserve its status as a Western Hemisphere Trading Corporation its sales are made through a conduit corporation, ASARCO International Corporation. Both Lake Asbestos and ASARCO Intl. are wholly owned by ASARCO. Lake Asbestos has its own staff, but ASARCO provides important management services. Lake Asbestos seeks ASARCO's direction and approval on major policy decisions. ASARCO Intl. is staffed entirely by ASARCO and Lake Asbestos employees. The business activities and operations of Lake Asbestos and ASARCO Intl. are in a field unrelated to ASARCO's mining and smelting operations and involve different technology. ASARCO shared no facilities, customers or sales force with these companies and it did not purchase any of their products.

5. ASARCO Mexicana, S.A.: This company mines and smelts lead and copper in Mexico. ASARCO owns 49% of the stock and the remainder is publicly held by Mexican nationals. At one time ASARCO owned 100% of the company, but in 1965 was required by Mexican law to divest itself of 51% of the stock. ASARCO Mexicana does not seek approval from ASARCO concerning major policy decisions, but ASARCO does provide technical services, makes some direct purchases from ASARCO Mexicana, and

acts as its agent for sales outside Mexico. ASARCO Mexicana pays ASARCO for those services.

6. Compania American Smelting, S.A.: This is a small company which purchases ore in Chile for ASARCO smelters. It is wholly owned by ASARCO and paid ASARCO small dividends in 1968 and 1969.

7. Hecla Mining Co., Kennecott Copper Co., Phelps-Dodge and United Park City Mines: These are four mining companies in which ASARCO owns a very small percentage of the stock. ASARCO exercises no control over these corporations and they made only minimal sales to ASARCO.

Interest Income: ASARCO received interest income from a variety of sources, including customers' notes and bonds, notes taken in connection with the sale of an Illinois plant and the sale of General Cable stock, and time certificates, bankers' acceptances and commercial paper notes. In its brief ASARCO indicates that it originally reported only its interest income from trade accounts receivable as business income. The MTC auditor, however, classified all of the foregoing interest income as business income.

Rents: ASARCO's rental income, which the auditor considered business income, was for the most part derived from homesites rented to employees working near ASARCO mines and plants.

Royalties: ASARCO earned royalties from leases to third parties of a portion of its mineral land, and from licenses to third parties of patents developed by ASARCO and used in ASARCO's business. The MTC auditor considered these royalties as business income.

Capital gains and losses: ASARCO realized gains on the disposition of three categories of assets: fixed assets, notes and bonds, and securities. The fixed assets were used in ASARCO's everyday business activities. The notes and bonds consisted of United States Treasury notes and bonds

and state and municipal notes and bonds. They were primarily acquired with idle cash in order to earn a return while the funds were not needed in ASARCO's business operations and they were generally held less than a year. The securities were in ASARCO subsidiaries and General Cable. The gains and losses realized from the disposition of these assets were all considered as business income by the MTC auditor.

The MTC auditor also made an alteration in the computation of the three factor formula used to apportion ASARCO's business income. UDITPA provides for the computation of a ratio of the taxpayer's property, payroll and sales in Idaho to its property, payroll and sales everywhere. This ratio, the Idaho apportionment factor, is applied to the taxpayer's total business income and the result is the portion of the taxpayer's business income attributable to Idaho and subject to its income tax. I.C. § 63-3027(i)-(q). In computing the denominator—the everywhere portion—of the sales factor, ASARCO included the value of some ore transferred from its mines in Idaho to its smelter in Montana. However, ASARCO did not include those transfers in the numerator of the sales factor in either Idaho or Montana, which is also a member of the multistate compact and participated in the joint audit. The MTC auditor included those transfers in the numerator of the Idaho sales factor but not in the numerator of the Montana sales factor.

As a result of all the adjustments by the MTC auditor, which were adopted by the commission, the commission assessed against ASARCO Idaho income tax deficiencies of $92,471.88 for 1968, $111,292.44 for 1969, and $121,750.76 for 1970, plus interest. ASARCO sought review of the deficiencies in the district court pursuant to I.C. § 63-3049. Following a court trial, the district court upheld the combination of ASARCO with six of its subsidiaries for tax reporting purposes, but the court determined that the

commission had erred in including the dividends, interest, royalties, rents and capital gains as business income. The district court did not modify the numerator of the sales factor to include the intracompany ore transfers as requested by the commission. The commission has appealed from the district court's ruling concerning the classification of income and from the court's refusal to modify the sales factor. ASARCO has not cross appealed from the district court ruling that the six subsidiaries were properly combined with ASARCO. This appeal therefore raises two sets of issues: (1) the classification of the disputed income, and (2) the modification in the sales factor. We address them in that order.

II

CLASSIFICATION OF INCOME

ASARCO challenged the commission's apportionment of its income from dividends, interest, rentals, capital gains and royalties as being inconsistent with a proper interpretation of the definition of business income found in I.C. § 63-3027(a)(1) and as being in violation of the due process and commerce clauses of the United States Constitution. We consider first the issue of statutory construction and second the constitutional issues.

A

Interpretation of Statutory Provisions

Business income is defined as:

> "63-3027. COMPUTING TAXABLE INCOME OF CORPORATIONS.— . . . .
>
> "(a) As used in this section, unless the context otherwise requires:
>
> "(1) 'Business income' means income arising from transactions and activity in the regular course of the

taxpayers' trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute integral *or necessary* parts of the taxpayers' trade or business operations. *Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation shall be presumed to be income from intangible property, the acquisition, management or disposition of which constitute an integral part of the taxpayers' trade or business; such presumption may only be overcome by clear and convincing evidence to the contrary. . . .*" (Emphasis indicates provisions not part of the uniform act but added by the Idaho legislature.)[2]

A few general comments concerning this definition of business income are necessary in order to put the issues raised in this appeal in the proper perspective.

First, the income referred to in subsection (a)(1) is income arising from the taxpayer's trade or business which is conducted, in part at least, in this state. Some corporations, particularly large conglomerates, may be engaged in several separate and distinct trades or businesses. The state may include as business income only the taxpayer's income arising from a trade or business conducted in this state and is not entitled to apportion income arising from a trade or business having no connection with this state.

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[2] In 1969 the legislature amended I.C. § 63-3027(a)(1) by deleting a phrase which limited the application of the presumption stated in the second sentence of the subsection to corporations "in which the taxpayer owns or has a right to acquire, directly or indirectly, more than five per cent (5%) of the voting stock . . . ." Ch. 319, § 9, 1969 Idaho Sess. Laws 982, 991-92. Neither party has argued that the prior statute requires a different result in this case than the application of the current statute, and the effect of that amendatory legislation is not an issue in this case.

However, "whether a number of business operations having common ownership constitute a single or unitary business or several separate businesses for tax purposes depends upon whether they are of mutual benefit to one another and on whether each operation is dependent on or contributory to others." Great Lakes Pipe Line Co. v. Commissioner of Taxation, 138 N.W.2d 612, 616 (Minn. 1965), *appeal dismissed* 384 U.S. 718 (1966). *See* Sperry & Hutchinson Co. v. Department of Revenue, 527 P.2d 729 (Ore. 1974); Idaho State Tax Comm. Reg. 27.IV.1.(b).[3] This qualification, though not directly stated by the statute's literal language, is required by the theory underlying apportionment statutes, *i.e.*, that the business income of a unitary business operating in several states cannot be precisely identified with particular states, *see generally*, Butler Bros. v. McColgan, 315 U.S. 501, 62 S.Ct. 701 (1942); Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L.J. 42 (1960), and by the constitutional requirement that there must be some minimal connection between the interstate business activities generating the income and the state seeking to tax that income. *See* Moorman Mfg. Co. v. Bair, —— U.S. ——, 98 S.Ct. 2340 (1978); Champion International Corp. v. Bureau of Revenue, 540 P.2d 1300, 1307-08 (N.M.Ct.App. 1975) (Lopez, J., specially concurring).

Second, under I.C. § 63-3027(a)(1) business income includes not only a corporation's typical earnings from its business activities but also income from tangible and intangible property if that property and income has the requisite connection with the corporation's trade or business. Prior to UDITPA most states did not apportion a multistate corporation's income from dividends, interest,

---

[3] Subsequent to the years involved in this appeal, the Idaho State Tax Commission adopted the interpretive regulations promulgated in 1973 by the Multistate Tax Commission. The Idaho regulation cited corresponds to MTC regulation IV.1.(b).

royalties, rents and gains, but, with some exceptions, the states allocated that income to a single jurisdiction. *See* State Taxation of Interstate Commerce: Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance, 93rd Cong. 1st Sess. 246, 252-54 (1973) (prepared statement of James H. Peters, The Distinction Between Business Income and Non-Business Income). Indeed, a preliminary draft of the uniform act followed this general approach. *See* First Tent. Draft of Uniform Allocation and Apportionment of Income Act, §§ 4-9, *reprinted in* Brief for Amicus Curiae, United States Steel Corp., Exhibit A. However, the Act in its final form and as enacted in this state specifically includes income from "the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute integral or necessary parts of the taxpayer's trade or business operations" as business income. I.C. § 63-3027(a)(1). This break with prior practice is underscored by the Idaho version of the Act which contains the specific presumption that income "from stock and securities of any foreign or domestic corporation" is business income and which may be overcome only by "clear and convincing evidence." I.C. § 63-3027(a)(1). In short, classifying income as interest, rents, royalties, dividends and capital gains does not determine whether the income is apportionable under UDITPA. All forms of income are subject to apportionment under UDITPA if the income falls within the definition of business income.

Third, we do not understand the statutory requirement that the acquisition, management, or disposition of the underlying property be an "integral or necessary" part of the taxpayer's trade or business, I.C. § 63-3027(a)(1), to mean that the property must be an absolutely indispensable part of the taxpayer's business. In taxation statutes the word "necessary" is not generally given such a restrictive meaning. *See, e.g.*, Welch v. Helvering, 290 U.S.

111, 54 S.Ct. 8 (1933) (expense deduction); Palo Alto Town & Country Village, Inc. v. Commissioner, 565 F.2d 1388 (9th Cir. 1977) (expense deduction); Boy's Club of Clifton, Inc. v. Township of Jefferson, 371 A.2d 22 (N.J. 1977) (exemption from property tax). Also, the word "necessary" was added to the uniform act by the Idaho legislature at the same time it added the presumption that income from stock and securities is business income. *See* ch. 254, § 1, 1965 Idaho Sess. Laws 639, 642-47. A very restrictive interpretation of "integral or necessary" would be inconsistent with the apparent legislative belief that income from securities would generally be business income. In our view the phrase "integral or necessary parts of the taxpayers' trade or business operations" refers to property which, though not absolutely essential to the conduct of the taxpayer's business, contributes to and is identifiable with the taxpayer's trade or business operations. *Cf.* Superior Oil Co. v. Franchise Tax Board, 386 P.2d 33, 38 (Cal. 1963) (defining "essential" as used in test for unitary business).

Although we do not read the phrase "integral or necessary" restrictively, our interpretation of that phrase is not as broad as that argued by the commission in this case. In a sense all investments and investment income of a corporation may benefit a corporation's business operations in that the investments may supply additional revenue for operating the trade or business, may improve the corporation's standing and financial posture, and in general may permit the corporation to conduct its regular business activities in a way it could not absent those investments. In this broad sense all corporate investments could be thought of as property the acquisition, management or disposition of which constitutes an integral or necessary part of its trade or business operations. This is the position argued by the commission. However, such an approach would include virtually all income as business income and would in effect emasculate the provisions of UDITPA which provide

for the allocation of income from specified tangible and intangible property. *See* I.C. § 63-3027(d)-(h). Under such a test it is doubtful whether a corporation could receive income that would not be classified as business income. Although the legislature clearly intended that the income from tangible and intangible property be included as business income in proper circumstances, it likewise intended that there would continue to be such a thing as corporate non-business investment income. Just as we reject the notion that income from tangible or intangible property is to be automatically classified as non-business income, we reject the notion that such income is to be automatically considered business income simply because the taxpayer's business operations may receive some incidental benefits from those investments.[4] *But see* Montana Department of Revenue v. American Smelting & Refining Co., 567 P.2d 901, 907-08 (Mont. 1977), *appeal dismissed* —— U.S. —— (1978).

In our view, in order for such income to be properly classified as business income there must be a more direct relationship between the underlying asset and the taxpayer's trade or business. The incidental benefits from investments in general, such as enhanced credit standing and additional revenue, are not, in and of themselves, sufficient to bring the investment within the class of property the

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[4] The extent to which income from intangibles is to be apportioned as business income has been a source of controversy within the MTC itself. In 1971 the MTC promulgated interpretive regulations containing a very expansive definition of business income in this respect. *See* 32 CCH State Tax Rev. No. 40 at 3-4 (Oct. 5, 1971). However, in 1973 the MTC promulgated a new set of regulations which retreated somewhat from the expansive interpretation contained in the 1971 version. *See* 34 CCH State Tax Rev. No. 10 at 2-6 (Mar. 6, 1973); *see discussion* Boren, Specific Allocation of Corporate Income in California: Some Problems in the Uniform Division of Income for Tax Purposes, 30 Tax L.Rev. 607, 681-700 (1975).

acquisition, management or disposition of which constitutes an integral part of the taxpayer's business operations. This view furthers the statutory policy of distinguishing that income which is truly derived from passive investments from income incidental to and connected with the taxpayer's business operations.

Finally, the facts in this case are based substantially on a lengthy stipulation between the parties, and for the most part they are not disputed. The decisive issues concern the proper application of the Idaho version of UDITPA to these facts. Accordingly, the scope of our review, which is a review of questions of law, is substantially broader than in cases where we are reviewing issues which turn on the resolution of disputed facts. Montana Department of Revenue v. American Smelting & Refining Co., *supra*. *See* Wessells v. State, 562 P.2d 1042 (Alaska 1977); Walt Keeler Co. v. Atchison, Topeka & Santa Fe Ry. Co., 354 P.2d 368 (Kans. 1960); Wendling v. Cundall, 568 P.2d 888 (Wyo. 1977); *cf.* Clements v. Clements, 91 Idaho 732, 430 P.2d 98 (1967) (absence of findings disregarded where facts clear from record). Also, most of the disputed items of income are "[g]ains or losses and dividend and interest income from stock and securities of . . . foreign or domestic corporation[s]." I.C. § 63-3027(a)(1). Such items of income are presumed to be "from intangible property, the acquisition, management, or disposition of which constitutes an integral part of the taxpayer's trade or business;" and this presumption may be overcome only by "clear and convincing evidence to the contrary." *Id.* Thus we must review the evidence to determine whether the trial court's findings contrary to that presumption are supported by clear and convincing evidence. *See* Ed Sparks & Sons v. Joe Campbell Constr. Co., 99 Idaho 139, 578 P.2d 681 (1978).

With these principles in mind we turn now to the issues concerning the application of the business income defini-

tion to the items of income involved in this appeal. We discuss these issues in terms of the type of income involved.

Dividends: With respect to the dividends involved here, the critical question is whether this income arose from ASARCO's business activities and whether ASARCO's acquisition, management or disposition of the underlying stock constitutes an integral or necessary part of its mining, smelting and refining business.

The district court ruled that the commission erred in classifying the dividends as business income, stating:

> "The next question is whether the dividends, interest, patent royalties and capital gains, together with rental income, were subject to tax by the State of Idaho as business income. The court has reviewed the facts and the authorities submitted by the parties and has concluded that they are not. American Smelting and Refining Company is in the business substantially of mining, smelting and refining and sales. The income described does not come from property or activities which is an integral part of taxpayer's trade or business. Plaintiff's position is well taken in that it would be unreasonable, unfair and contrary to the law to allow the State of Idaho to throw this income in to be taxed under the circumstances of this case without allowing the plaintiff to consider all of the income and all of the expenses of all of the corporations involved. It appears to the court that if the dividend income from other corporations is an integral part of the business of the plaintiff that they should be unitized and all matters considered and if they are not that the income is not business income but is non business income."

The district court appears to have disapproved of the commission's action in including the dividends as business income for two reasons. First, the district court stated that

it was an error to include this income "without allowing [ASARCO] to consider all the income and all the expenses of all the corporations involved." Presumably the trial court was referring to the fact that the sales, payroll and property of the dividend-paying corporations were not represented in the three factor apportionment formula. We note, however, that although the statute clearly provides for the apportionment of dividend income when such income falls within the statutory definition of business income, it does not specifically provide for the representation of the sales, payroll and property of the dividend-paying corporations in the apportionment formula. *See* I.C. § 63-3027(j)-(r). The commission's apportionment of the dividends without including the factors of these corporations in the formula did not violate the statutory provisions. However, the commission's action does raise certain constitutional questions which we consider later in this opinion.

Second, the district court seems to have concluded that since the corporations which paid the dividends were not sufficiently connected with ASARCO's business operations to justify combining those corporations with ASARCO for tax reporting purposes pursuant to I.C. § 63-3027(s), the stock ASARCO owned in those corporations was *ipso facto* not an integral or necessary part of ASARCO's trade or business so as to justify including the dividends they paid ASARCO as part of ASARCO's apportionable business income under I.C. § 63-3027(a)(1). When corporations are combined under subsection (s) for tax reporting purposes, the dividends paid one corporation by the other are not considered income but, as the commission did in this case, are properly treated as intracompany transfers. The district court's reasoning, therefore, would preclude dividends from ever being classified as business income and is thus clearly inconsistent with subsection (a)(1) which presumes that dividends are business income. The effect of this reasoning would nullify the statutory provision, a result

we must avoid if possible. Magnuson v. Idaho State Tax Commission, 97 Idaho 917, 556 P.2d 1197 (1976).

However, these provisions are not necessarily inconsistent. They have different objectives and they can be read harmoniously if those objectives are kept in mind. The combined reporting provision of subsection (s) is a further refinement of the basic apportionment principle. Its purpose is to permit application of the UDITPA formula to a single business enterprise which is conducted by means of separately incorporated entities. *See* United States Steel Corp. v. Multistate Tax Commission, —— U.S. ——, ——, n. 25, 98 S.Ct. 799, 813, n. 25 (1978). In an economic sense such a business is no different than a similar business composed of a single corporation with several separate divisions. *Compare* Butler Bros. v. McColgan, *supra, with* Edison California Stores, Inc. v. McColgan, 183 P.2d 16 (Cal. 1947). For tax reporting purposes such businesses should be treated the same. Coca Cola Co. v. Department of Revenue, 533 P.2d 788 (Ore. 1975); Keesling, A Current Look at the Combined Report and Uniform Allocation Practices, 42 J.Tax. 106 (1975).

In contrast, subsection (a)(1), which authorizes the apportionment of a taxpayer's dividend income in certain circumstances, addresses a very different question. While the combined reporting provision concerns a proper identification of the contours of the business enterprise, the business income definition of subsection (a)(1) concerns the differentiation between truly passive investment income and income which is incidental to or connected with the taxpayer's business operations. These are two related but conceptually and legally very different questions. Simply because the management, operation and activity of a corporation in which the taxpayer owns stock is not so closely connected with the management, operation and activities of the taxpayer to warrant a combined tax return, does not *ipso facto* mean that the dividends the taxpayer re-

ceives from that stock cannot be "income arising from transactions and activities in the regular course of the taxpayer's trade or business" and that the "acquisition, management, or disposition" of the stock does not "constitute integral or necessary parts of the taxpayer's trade or business operations." I.C. § 63-3027(a)(1). The combined reporting provision and the business income definition serve different purposes, ask different questions and apply different standards. The answer to one does not necessarily imply the same answer to the other.

With respect to the dividends ASARCO received from Southern Peru Copper Corp.; M.I.M. Holdings, Ltd.; General Cable; Revere Copper; ASARCO Mexicana, S.A.; and Compania American Smelting, S.A., we conclude that the record does not contain clear and convincing evidence to rebut the statutory presumption and does not support the trial court's finding that those dividends were not business income. For the years in question ASARCO owned a controlling or at least a very substantial interest in each of these corporations. They are all engaged in businesses closely related to ASARCO's mining and smelting operations and, with the exception of M.I.M., ASARCO did a substantial amount of business with them and provided them with a variety of technical services. The clear inference from these facts is that ASARCO's interest in these companies was not merely that of a passive investor but that this dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral and necessary part of its mining and smelting business. We recognize that M.I.M., for the years in question, seems to have operated independently of ASARCO and did little if any business with ASARCO. Although ASARCO owns a controlling interest in M.I.M., ASARCO did not exercise its right to control the corporation, apparently for political reasons. Nevertheless, ASARCO does own a majority of M.I.M. stock and M.I.M. is engaged in

virtually the same business as ASARCO. Given these facts and the statutory presumption we conclude that the trial court erred in concluding that ASARCO's interest in M.I.M. was merely a passive investment unrelated to ASARCO's mining and smelting business.

However, we conclude that there was clear and convincing evidence to sustain the trial court's finding that the dividends from Lake Asbestos, ASARCO Int., Hecla Mining Co., Kennecott Copper Co., Phelps-Dodge and United Park City Mines were not business income. Although the record indicates certain management connections between ASARCO and Lake Asbestos and ASARCO Intl., the record indicates that this asbestos mining and processing activity is distinct, separate and unrelated to ASARCO's general mining and smelting business. Regardless of whether the dividends these corporations paid ASARCO would have constituted business income with respect to an asbestos business, the record discloses that these asbestos operations have no connection with the trade or business ASARCO conducts. Therefore, that dividend income is not business income subject to apportionment by this state. *See* Sperry & Hutchinson Co. v. Department of Revenue, *supra*.

The four remaining companies from which ASARCO received dividends are all engaged in mining activities similar to those pursued by ASARCO. Nevertheless, ASARCO's stock ownership in those companies is so small and its business dealings with them are so insignificant that, despite the statutory presumption, we conclude that the trial court's finding that ASARCO's ownership of that stock was more of a separate investment activity than a part of its trade or business operations is supported by the evidence. Therefore, the dividends these companies paid ASARCO should not have been included as business income.

Interest:[6] In general, the source of ASARCO's interest income was customer notes and other obligations ASARCO received in the regular course of its mining and smelting operations. As such, they were therefore properly considered as business income by the commission, and the trial court's findings to the contrary are not supported by the evidence. *See* Montana Department of Revenue v. American Smelting & Refining Co., *supra;* Sperry & Hutchinson Co. v. Department of Revenue, *supra;* Champion International Corp. v. Bureau of Revenue, *supra; cf.* Great Lakes Pipe Line Co. v. Commissioner of Taxation, 138 N.W.2d 612 (Minn. 1965) (interpreting statute analogous to UDITPA), *appeal dismissed* 384 U.S. 718 (1966).

Rents: ASARCO's rental income was primarily derived from property used in or very closely related to its mining and smelting operations. Accordingly, the trial court erred in excluding rents from business income. I.C. § 63-3027(a)(1) and (d). *See* Montana Department of Revenue v. American Smelting & Refining Co., *supra;* Champion International Corp. v. Bureau of Revenue, *supra.*

Royalties: The record indicates that the assets generating ASARCO's royalty income were acquired or developed by ASARCO in the course of its regular business operations. This income was related to or a consequence of its business operations and was therefore properly considered business income by the commission. *See* Montana Department of Revenue v. American Smelting & Refining Co., *supra; cf.* Texaco, Inc. v. Wasson, 237 S.E.2d 75 (S.C. 1977) (interpreting statute analogous to UDITPA).

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[6] The presumption of business income in I.C. § 63-3027(a)(1) extends only to "gains and losses and dividends and interest income from stock or securities of any foreign or domestic corporation. . . ." It does not apply to gains and losses and interest income from other sources or to rents and royalties. With respect to income not encompassed by the statutory presumption, ASARCO, as the plaintiff, bore the usual burden of persuading by a preponderance of the evidence.

Capital gains and losses: As previously mentioned, ASARCO's capital gains and losses resulted from the disposition of three types of assets: fixed assets, short term notes and bonds, and securities.

The fixed assets were used in ASARCO's everyday business activities and therefore gains realized on their disposition were business income. The trial court's finding to the contrary is not supported by the evidence.

The notes and bonds represented the short term investment of idle funds until they were needed in ASARCO's ordinary business operations. Accordingly, the trial court erred in not considering the gains realized from the disposition of those notes and bonds as business income. *See* Montana Department of Revenue v. American Smelting & Refining Co., *supra;* Sperry & Hutchinson Co. v. Department of Revenue, *supra;* Champion International Corp. v. Bureau of Revenue, *supra; cf.* Great Lakes Pipe Line Co. v. Commissioner of Taxation, *supra.*

ASARCO also realized gains from the sale of stock in its subsidiaries and General Cable. In our view the same standard applies to the question whether gains from the sale of stock are business income as applies to the question whether dividends from the stock are business income. The focus of the inquiry should be upon the purpose and use of the stock by ASARCO prior to its disposition. *See* I.C. § 63-3027(a)(1); Montana Department of Revenue v. American Smelting & Refining Co., *supra*; Champion International Corp. v. Bureau of Revenue, *supra; cf.* Johns-Manville Products Corp. v. Commissioner of Revenue Administration, 343 A.2d 221 (N.H. 1975) (similar approach, but not interpreting UDITPA), *appeal dismissed* 423 U.S. 1069 (1976). Inasmuch as we have already concluded that the trial court's conclusion that ASARCO sustained its burden of proving by clear and convincing evidence that the dividends it received from this stock were not business income is not supported by the evidence, we similarly con-

clude that the trial court's conclusion that the gains and losses realized on the disposition of the stock were not business income is not supported by the record.

Having resolved these issues concerning the items of ASARCO's income which are properly apportionable under the Idaho version of UDITPA, we consider now the constitutional questions.

B

Constitutional Issues

The constitutionality of formulary apportionment is firmly established under both the due process and commerce clauses of the United States Constitution. Moorman Mfg. Co. v. Bair, —— U.S. ——, 98 S.Ct. 2340 (1978); General Motors Corp. v. District of Columbia, 380 U.S. 553, 85 S.Ct. 1156 (1965); Bass, Ratcliff & Gratton, Ltd. v. State Tax Comm., 266 U.S. 271, 45 S.Ct. 82 (1924). ASARCO does not attack the constitutionality of formulary apportionment in the abstract, but argues that the manner in which the commission applied the UDITPA formula in this case produced a result violative of the due process and commerce clauses. We consider first the issues raised under the due process clause and then those raised under the commerce clause.

The Supreme Court of the United States recently summarized the limitations imposed by the due process clause on the states' power to tax the income of interstate businesses:

> "The Due Process Clause places two restrictions on a State's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing state. . . . Second, the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing

state.'" Moorman Mfg. Co. v. Bair, —— U.S. ——, ——, 98 S.Ct. 2340, 2344 (1978) (citations omitted).

In the context of the first due process restriction, ASARCO argues that the commission imposed a tax on income derived from sources and activities which have no connection with this state. In particular, ASARCO refers to the apportionment of dividends it received. ASARCO argues that these dividends are derived from the business activities of the dividend-paying corporations and that these corporations have no connection with Idaho. This argument, however, rests upon a misconception of what the state sought to tax. As the Vermont court recently ruled in In re Goodyear Tire & Rubber Co., 335 A.2d 310 (Vt. 1975):

> "Goodyear's constitutional argument rests on its allegations that its extra-territorial values are being taxed. This allegation, however, fails to distinguish the foreign dividend income that Goodyear receives from its subsidiaries from the profits those subsidiaires realize from their own business activities conducted without the borders of Vermont. The right to receive dividends is incident to the ownership of stock. LaFountain & Woolson Co. v. Brown, 91 Vt. 340, 342, 101 A. 36 (1917). Profits, on the other hand, are the net proceeds obtained by deducting from the gross proceeds all forms of expense or outlay involved in, or incidental to, the business in question. Stratton v. Cartmell, 114 Vt. 191, 195, 42 A.2d 419 (1945).
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> "The failure of the county court to make a finding on the issue of whether Goodyear's subsidiaries were operated as separate entities does not constitute error because of the lack of relevance such a finding has to the taxation of foreign dividend income. Vermont's corporate income tax does not seek to tax the profits

> realized from the business activities of Goodyear's subsidiaries conducted without the borders of Vermont. It is taxing only the dividend income realized by Goodyear itself." *Id.* at 311-12.

See F. W. Woolworth Co. v. Commissioner of Taxes, 328 A.2d 402 (Vt. 1974); Gulf Oil Corp. v. Morrison, 141 A.2d 671 (Vt. 1958). The commission did not levy a tax upon the income of the dividend-paying corporations; rather, it levied a tax upon ASARCO's income. Those dividends are clearly part of ASARCO's income and it is unquestioned that there is a sufficient connection between ASARCO and this state to constitutionally permit the state to tax its proper share of ASARCO's income. If the due process clause were to prohibit the inclusion of dividends in a taxpayer's taxable income unless the payor corporation also conducts business within the taxing state, the due process clause would logically also prohibit the taxpayer's domicile from taxing those dividends if the payor corporation did not conduct its business within the domiciliary state, and indeed it would prohibit the United States and any state from ever taxing dividends paid the taxpayer by a corporation whose activities are located entirely without this country. The due process clause simply does not limit the right to tax dividends paid a taxpayer to the jurisdictions in which the payor corporation conducts its business. We believe that any constitutional limitations upon a state's right to apportion the intangible income, including dividends, of a multistate corporation doing business within the state are satisfied by the Idaho statutory requirement that the acquisition, management or disposition of the underlying asset must be an integral or necessary part of the taxpayer's unitary business, a part of which is conducted in this state. *See* In re Goodyear Tire & Rubber Co., *supra;* F. W. Woolworth Co. v. Director of Division of Taxation, 213 A.2d 1 (N.J. 1965); Great Lakes Pipe Line Co. v. Commissioner of Taxation, 138 N.W.2d 612 (Minn. 1965), *appeal dis-*

missed 384 U.S. 718, (1966); Champion International Corp. v. Bureau of Revenue, 540 P.2d 1300 (N.M.App.Ct. 1975); *cf.* National Leather Co. v. Massachusetts, 277 U.S. 413, 48 S.Ct. 534 (1928) (franchise tax measured by capital stock); Cleveland-Cliffs Iron Co. v. Michigan Corporation & Securities Comm., 88 N.W.2d 564 (Mich. 1958) (franchise tax measured by capital stock). *But see* Square D Co. v. Kentucky Bd. of Tax Appeals, 415 S.W.2d 594 (Ky. 1967); Gulf Oil Corp. v. Clayton, 147 S.E.2d 522 (N.C. 1966).

In the context of the second due process limitation—that the income attributed to Idaho for tax purposes must be rationally related to values connected with this state—ASARCO attacks the commission's computation of its tax liability on two grounds. ASARCO first argues that if the dividends it received are included as apportionable business income, then the due process clause requires that the property, payroll and sales factors of the dividend paying corporations be included in the denominator of the apportionment formula; otherwise ASARCO claims the income apportioned to Idaho would be disproportionate to the income producing activities within the state. This argument is premised on the same misconception about the entity and income the state is attempting to tax that we discussed above and has been soundly rejected for the same reasons. F. W. Woolworth Co. v. Commissioner of Taxes, 328 A.2d 402 (Vt. 1974); *see also* F. W. Woolworth Co. v. Director of Division of Taxation, 213 A.2d 1 (N.J. 1965).

In any event, I.C. § 63-3027 does not provide for the inclusion of the factors of these corporations in the apportionment formula. From a constitutional standpoint, this argument presents the same question raised by ASARCO's second argument that, regardless of whether the apportionment formula was properly computed, in this case it produced a result violative of the due process clause. The United States Supreme Court recently summarized the burden ASARCO must sustain in order to prevail on this argument:

> "... But in neither *Hans Rees'* nor *Norfolk & Western* did the Court depart from the basic principles that the States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted ... in that State.' 283 U.S., at 135, or has 'led to a grossly distorted result.' 390 U.S., at 326. Moorman Mfg. Co. v. Bair, —— U.S. ——, 98 S.Ct. 2340, 2345 (1978).

ASARCO's arguments in this respect are based upon a comparison of the income apportioned to Idaho by the formula with the income ASARCO claims was actually earned by its Idaho operations as evidenced by its own separate accounting analysis. For example, ASARCO's separate accounting analysis shows a loss of $1,464,885 from its Idaho operations in 1969. This loss was primarily from its exploration and development activities. Testimony indicated that some of its Idaho operations operated at a profit. However, the apportionment formula attributed $2,274,750, or 2.53% of ASARCO's business income in 1969, to Idaho.

In general, multistate businesses have been remarkably unsuccessful in attacking the results of apportionment formulas by comparing those results with those of a separate accounting analysis. *See, e.g.*, Butler Bros. v. McColgan, 315 U.S. 501, 62 S.Ct. 701 (1942); John Deere Plow Co. v. Franchise Tax Bd., 238 P.2d 569 (Cal.), *appeal dismissed* 343 U.S. 939 (1951); Walgreen Co. v. Commissioner of Taxation, 104 N.W.2d 714 (Minn. 1960); Crane Co. v. Carson, 234 S.W.2d 644 (Tenn.), *cert. denied* 340 U.S. 906 (1950). *But see* Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123, 51 S.Ct. 385 (1931) (formula which taxed 80% of income while only 17% had actual source in state). The reason why such arguments generally fail is explained

in the United States Supreme Court's decision in *Butler Bros.*:

> "It is true that appellant's separate accounting system for its San Francisco branch attributed no net income to California. But we need not impeach the integrity of that accounting system to say that it does not prove appellant's assertion that extraterritorial values are being taxed. Accounting practices for income statements may vary considerably according to the problem at hand. . . . A particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders. . . . That may be due to the fact, as stated by Mr. Justice Brandeis in Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 121, 41 S.Ct. 45, 47, 64 L.Ed. 165, that a State in attempting to place upon a business extending into several States 'its fair share of the burden of taxation' is 'faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders.' Furthermore, the particular system used may not reveal the facts basic to the State's determination. . . . In either aspect of the matter the results of the accounting system employed by appellant do not impeach the validity or propriety of the formula which California has applied here." 315 U.S. at 507-08, 62 S.Ct. at 704 (citations omitted).

Accordingly, the constitutional question is not whether the result reached by the apportionment formula is grossly disproportionate to the result reached by ASARCO's separate accounting analysis, but the proper question is whether ASARCO has established by clear and cogent evidence that the income attributed to the state by the apportionment formula is in fact "out of all appropriate propor-

tion" to ASARCO's business activities in the state. In our view ASARCO has not sustained that burden.

The essence of ASARCO's argument under the commerce clause is that since Idaho's use of the UDITPA apportionment formula may result in the duplicative taxation of its income by other states, the statute places an unconstitutional burden on interstate businesses. In particular, ASARCO emphasizes that since many states allocate income from intangible and tangible property to a single jurisdiction, the apportionment by Idaho of the same income will result in multiple taxation. However, ASARCO has not established that it was in fact subject to multiple taxation and the possibility of such double taxation has been rejected as a ground for invalidating an apportionment statute. Moorman Mfg. Co. v. Bair, *supra*. Moreover, the courts have consistently held that the possibility of overlapping taxation does not present constitutional problems so long as the state's formula, considered on its own merits, is not repugnant to the Constitution. *See* Moorman Mfg. Co. v. Bair, *supra;* General Motors Corp. v. State, 509 P.2d 1260 (Colo. 1973); Hellerstein, Symposium Foreword, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand.L.Rev. 335, 347 (1976). As the Court in *Moorman* stated:

> "This method [formula apportionment], unlike separate accounting, does not purport to identify the precise geographical source of a corporation's profits; rather, it is employed as a rough approximation of a corporation's income that is reasonably related to the activities conducted within the taxing State. The single-factor formula used by Iowa, therefore, generally will not produce a figure that represents the actual profits earned within the State. But the same is true of the Illinois three-factor formula. Both will occasionally over-reflect or under-reflect income attributable to the taxing State. Yet despite this imprecision, the Court

has refused to impose strict constitutional restraints on a State's selection of a particular formula. —— U.S. at ——, 98 S.Ct. at 2344.

We find no constitutional infirmity under the commerce clause in the statute before us in this case. The problem raised by ASARCO is essentially the result of the lack of uniformity between the states. It would indeed be ironic for us to strike down this statute, which is patterned after a widely adopted uniform act drafted in an attempt to provide some uniformity in this area, on the grounds that it may be in conflict with the statutes of some other states which have not adopted the uniform act.

III

SALES FACTOR

In computing the sales factor for the tax years in question the commission included in the numerator, which represents the sales attributable to Idaho, intracompany transfers of ore from ASARCO's mines in Idaho to its smelter in Montana. The trial court excluded those transfers from the Idaho sales factor. ASARCO contends that the transfer should not be included in the numerator of the Idaho sales factor since the statute requires the sales to be reported on a destination basis and Idaho was not the final destination of these sales. I.C. § 63-3027(p)(1). The commission, however, argues that ASARCO's accounting method made it extremely difficult, if not impossible, to determine the sales on a final destination basis and that its adjustment of the sales factor was a proper exercise of its authority under I.C. § 63-3027(r) to make adjustments in the formula when "the allocation and apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this state . . . ."

Although the record is somewhat confusing in this respect, the controversy appears to center on ASARCO's "margin method" of accounting, which ascribes the receipts

from the sale of primary metals to the various steps within its mining, smelting and refining operations. According to the auditor's testimony at trial, if ASARCO, for example, received $6.00 on the final sales of a primary metal, its margin method of accounting would attribute, for example, $3.00 to its mining operation, $1.50 to its smelting operation, $1.00 to its refining operation, and the balance of $.50 to sales or sales commission.

The auditor appears to have encountered two problems in computing the sales factor with records maintained on this basis. First, I.C. § 63-3027(a)(5) and (o) require that the sales factor be computed on a gross receipts basis. The auditor testified that the total sales computed under this margin method of accounting would be the same as when computed on a gross receipts basis only if the ore was first extracted from ASARCO's mines. Where the ore was purchased from other mines, the auditor concluded that ASARCO's accounting method would reflect only the total value of the services ASARCO performed in smelting, refining and selling the ore, which in our example would be $3.00, and not the total gross receipts ASARCO would receive on the final sale of the product, $6.00 in our example.

Second, in general UDITPA requires that sales be reported in the numerator only if the goods were shipped to a purchaser in the taxing state. *See* I.C. §§ 63-3027(p)(1) and -3027(p)(2). Although this margin method of accounting would presumably indicate the value of the services performed by ASARCO's various operations in the various states, the auditor concluded that the records ASARCO maintained using this accounting method did not allow him to ascertain the final destination of ASARCO's sales of primary metals.

Because of these difficulties in using ASARCO's accounting method, the MTC auditor adjusted the numerator of the Idaho sales factor to include the value of ore shipped

from ASARCO's mines in Idaho to its smelter in Montana. However, these transfers of ore were clearly not true sales but merely intracompany transfers. Nevertheless, the auditor apparently believed this adjustment was necessary because of his inability to compute the sales factor according to the statutory method and in order to make the computation of the numerator consistent with ASARCO's margin method of accounting and its computation of the denominator.

The trial court did not address the propriety of this adjustment. However, we believe that the apportionment formula should be computed according to the procedures set forth in the statute unless use of these procedures in a particular case is impossible or entirely impractical or unless it is clearly established that the result produced by the statutory formula does "not fairly represent the extent of the taxpayer's business activity in this state . . . ." I.C. § 63-3027(r). We therefore remand this issue to the district court for further proceedings to determine whether the sales factor can be computed according to the statutory method. If on remand the court concludes that it cannot or that it produces a result which manifestly does not represent the extent of ASARCO's activity in the state, the court is to determine whether the adjustment made by the commission was a reasonable exercise of its authority under I.C. § 63-3027(r).

The case is reversed and remanded for further proceedings and for recomputation of ASARCO's income tax liability in accordance with this opinion.

Reversed and remanded.

SHEPARD, C.J., MCFADDEN, DONALDSON and BISTLINE, JJ., concur.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 53182

AMERICAN SMELTING AND REFINING COMPANY, *Plaintiff*,

vs

IDAHO STATE TAX COMMISSION, *Defendant*.

MEMORANDUM

Plaintiff filed suit alleging that the Idaho State Tax Commission had improperly determined income tax deficiencies and interest against the plaintiff for the years 1968, 1969, and 1970 in that deficiencies and interest charges had been assessed against the plaintiff by reason of income which plaintiff derived from dividends, interest, patent royalties and capital gains subject to tax by the State of New York, the commercial domicile of the plaintiff.

This matter came on for hearing and was submitted to the court upon the stipulation of the parties and the evidence that had been presented. The parties have presented their briefs. The primary questions appear to be first whether the tax commission properly combined the plaintiff with six of its wholly own subsidiaries which constitute a unitary business enterprise.

The court has reviewed this matter and could spend considerable time discussing the matter which I don't think would be beneficial to either of the parties or the Supreme Court where this matter is obviously headed. The court has concluded that the plaintiff and the six subsidaries do constitute a unitary business enterprise and were properly so treated for tax purposes.

The next question is whether the dividends, interest, patent royalties and capital gains, together with rental

income, were subject to tax by the State of Idaho as business income. The court has reviewed the facts and the authorities submitted by the parties and has concluded that they are not. American Smelting and Refining Company is in the business substantially of mining, smelting and refining and sales. The income described does not come from property or activities which is an integral part of taxpayer's trade or business. Plaintiff's position is well taken in that it would be unreasonable, unfair and contrary to the law to allow the State of Idaho to throw this income in to be taxed under the circumstances of this case without allowing the plaintiff to consider all of the income and all of the expenses of all of the corporations involved. It appears to the court that if the dividend income from other corporations is an integral part of the business of the plaintiff that they should be unitized and all matters considered and if they are not that the income is not business income but is non business income.

Counsel for the plaintiff may prepare such Findings of Fact and Conclusions of Law and Order as is necessary in conformance with this opinion.

Dated this 13th day of November, 1975.

/s/ Marion J. Callister
Marion J. Callister
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 53182

AMERICAN SMELTING AND REFINING COMPANY, *Plaintiff*,

vs

IDAHO STATE TAX COMMISSION, *Defendant*.

FINDINGS AND CONCLUSIONS

The court being fully advised in the premises, after having presided at pre-trial hearings, heard presentations of evidence at trial and argument and reviewed various briefs of the parties does hereby make the following:

Findings of Fact

1. The court has jurisdiction of the matters involved in this controversy and of the parties.

2. The court adopts and incorporates as if set out herein the stipulations of fact entered into, agreed upon, executed and entered into the record by the parties and the facts recited in the pre-trial order agreed upon by the parties and signed by the court.

3. Deficiency assessments against the plaintiff for the year 1968 in the amount of $92,471.88; 1969 in the amount of $111,292.44; and 1970 in the amount of $121,750.76 are the subject matter of this litigation.

4. The plaintiff utilizes separate accounting for internal purposes, uses this method for determining and reporting its taxable income for federal tax purposes and this method accurately reflects the plaintiff's taxable income in the State of Idaho.

5. The State Tax Commission is apportioning all income of taxpayer as business income and through apportionment taxing a portion of all plaintiff's income.

6. Plaintiff uses a separate accounting method using a margin's system. Plaintiff's taxable income in Idaho determined by separate accounting and plaintiff's taxable income in Idaho determined by apportionment method applied by the State Tax Commission in asserting the deficiency for the separate years involved in this case is:

	Separate Accounting	Apportionment	Difference
1968	($290,304.00)	$1,541,198.00	$1,831,502.00
1969	($1,464,885.00)	$2,274,750.00	$3,373,835.00
1970	($2,292,929.00)	$2,162,346.00	$4,455,275.00

7. The plaintiff is in the business of mining of copper and non-ferrous metals, gold, silver, copper, lead, zinc and asbestos, and in smelting and refining and selling these metals and in the sale of secondary metals. For the years involved, the percentage of operating income realized by plaintiff from its separate business operations is set out below

	1968	1969	1970
Mining	66%	59%	76%
Smelting & Refining	33%	38%	22%
Secondary Metals	1%	3%	2%

Mining earnings from separate minerals mined are:

	1968	1969	1970
Copper	86%	88%	91%
Lead and Zinc	12%	11%	7%
Silver	2%	1%	2%

8. Plaintiff's fixed asset investment in the separate businesses reflect the following percentages:

Mining	61%
Smelting and Refining	35%
Secondary Metals	4%

9. Plaintiff's principal business in Idaho is the mining of silver; it also mines lead and zinc, operates an administrative office for its northwest mining division and sells secondary metals in Idaho.

10. The silver mine operated by plaintiff in Idaho is the only silver mine owned or operated by plaintiff.

11. The plaintiff sells no primary metals, the destination of which is Idaho. Plaintiff sells secondary metals the destination of which is Idaho and for the years involved the sales were:

1968	$ 70,000.00
1969	$ 70,000.00
1970	$108,000.00

12. Plaintiff's mining operations in the northwest are limited to lead and zinc mines and the silver mine which it operates in Idaho.

13. Plaintiff's northwest mining division experienced losses for the years involved in the following amounts:

1968	($ 660,423.00)
1969	($2,880,727.00)
1970	($3,161,775.00)

14. Plaintiff does not smelt or refine ore produced in its Idaho mines in Idaho. This ore is shipped to smelters operated by the plaintiff in East Helena, Montana; El Paso,

Texas; and Selby, California. For the years involved, ore was shipped in the following proportions:

	East Helena	El Paso	Selby
1968	8.6%	40.7%	50.7%
1969	0%	56.5%	43.5%
1970	18.1%	58.3%	23.6%

15. For the years involved plaintiff's before tax earnings, including income from intangibles, and dividends paid by plaintiff to its shareholders were:

	1968	1969	1970
Before tax earnings	$80.6 mil.	$101 mil.	$102.5 mil.
Dividends paid	$38.2 mil.	55.2 mil.	53.9 mil.
Dividends as a percentage of earnings	48%	55%	53%

16. Plaintiff has never been required to utilize its stock as security for borrowing of working capital, acquiring stock or securities in other companies or to support any bond issues.

17. The taxpayer has sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from smelting, refining, sale of secondary metals or income from intangibles.

18. Plaintiff is the major custom smelter in the United States, doing approximately 80% of that work in this country.

19. Asarco Mercantile and International Metal Company are shell companies fully owned by the plaintiff, staffed, directed and controlled by plaintiff and using facilities owned by it and are subject to internal auditing by plaintiff. This subsidiary and the plaintiff constitute a unitary business.

20. Lone Star Lead Construction Company is wholly owned by plaintiff, staffed by plaintiff's employees, occupies facilities owned by plaintiff, identifies itself with its parent in advertising and does not operate independently of the plaintiff. This subsidiary and the plaintiff constitute a unitary business.

21. Enthone, Inc., is wholly owned by plaintiff, identifies itself with plaintiff in advertising, does not operate independently of the plaintiff and is subject to internal auditing by plaintiff. This subsidiary and the plaintiff constitute a unitary business.

22. Federated Metals is wholly owned and provided financing by plaintiff, does not operate independently of the plaintiff and is subject to internal auditing by plaintiff. This subsidiary and the plaintiff constitute a unitary business.

23. Northern Peru is wholly owned by plaintiff, does not operate independently of the plaintiff and is subject to internal auditing by plaintiff. This subsidiary and the plaintiff constitute a unitary business.

24. The combination of ownership and use through controlled operation is sufficient to require combination or unitization of these six companies with the plaintiff to accurately reflect income.

25. Asarco Australia, Asarco Development, Asarco Exploration, Compania American Smelting, S. A., Lake Asbestos of Quebec and Asarco International are wholly owned by plaintiff and are subject to control by plaintiff but are not integral or necessary parts of the plaintiff's business operations.

26. Neptune Gold Mining Company is 51.8% owned by plaintiff, is operated by plaintiff pursuant to contract but operates independently of plaintiff. Neptune Gold Mining Company is neither an integral part of plaintiff's business

nor necessary to plaintiff's business and prudent judgment does not dictate ownership of this stock.

27. Southern Peru Copper Sales is 51.5% owned by plaintiff, staffed by plaintiff's employees and is subject to control of plaintiff but is not an integral or necessary par of plaintiff's business operations which prudent business judgment dictates should be owned by plaintiff.

28. Asarco Mexicana is 49% owned by plaintiff, operates independently of plaintiff and is not an integral part of nor necessary to plaintiff's business and prudent business judgment does not dictate ownership of this stock.

29. Southern Peru Copper is 51.5% owned by plaintiff, subject to a management contract which insures that plaintiff will not be able to control said company, operates independently of plaintiff and is not an integral part of nor necessary to plaintiff's business nor does prudent business judgment dictate ownership of this stock.

30. M.I.M. Holdings is 52.7% owned by plaintiff, operates entirely independently of and has minimal contact with plaintiff, is not an integral or necessary part of plaintiff's business nor does prudent business judgment dictate ownership of this stock by plaintiff.

31. The court also finds that the other corporations in which plaintiff has stock interests are not controlled by plaintiff and are not integral parts of nor necessary to plaintiff's business and prudent business judgment does not dictate ownership of this stock by plaintiff.

32. Plaintiff has sustained its burden of proof and presented clear and convincing evidence that its income from intangibles is not business income.

33. The tax imposed pursuant to the method utilized by the State Tax Commission, apportioning dividends, interest, capital gains, rents and royalties as business income, and excluding from the property, sales and payroll factors

all or a proportionate part of the property, sales and payrolls of the corporations the dividends of which are apportioned arbitrarily assigns to Idaho income for tax purposes which does not reflect and greatly exceeds an amount which would accurately reflect plaintiff's business in Idaho.

Conclusions of Law

1. The court has jurisdiction of the subject matter and the parties.

2. Federated Metals of Canada, Asarco Mercantile, Inc., Enthone, Inc., International Metal Company, Lone Star Lead Construction Company and Northern Peru Mining Company are corporations wholly owned by plaintiff consolidation of which is necessary to accurately reflect plaintiff's income within the State of Idaho.

3. Asarco Australia, Asarco Development, Asarco Exploration, Compania American Smelting S.A., Lake Asbestos of Quebec, Asarco International, Southern Peru Copper, Southern Peru Copper Sales, M.I.M. Holdings, Neptune Gold Mining Company, Asarco Mexicana, General CAble, REvere Copper, Helca Mining, Kennicott Copper, Phelps Dodge, United Park City MInes [sic] and other companies in which plaintiff owns an interest are not integral to nor a necessary part of plaintiff's business operation nor does prudent business judgment dictate ownership of stock in these companies and plaintiff has met the burden of proof imposed upon it by statute in that the plaintiff has presented clear and convincing evidence that its income from intangibles is not business income.

4. The method used by the State Tax Commission in apportioning income is not authorized by the statute.

5. Plaintiff's income for 1968, 1969 and 1970 should be computed by apportioning business income but allocating

income from dividends, interest, royalties, rents and other non-business income to New York, its commercial domicile.

DATED this 14th day of November, 1975, as of this 15th day of January, 1976, nunc pro tunc.

/s/ MARION J. CALLISTER
Marion J. Callister
District Judge

The above findings and conclusions are accepted and ordered entered as a decision of the Ada County District Court.

/s/ ILLEGIBLE
District Judge

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

Docket No. C-340
C-501

In the Matter of the Petition for Redetermination of Income Tax Deficiency by

AMERICAN SMELTING & REFINING COMPANY (ASARCO)

DECISION

Taxpayer protests a Notice of Deficiency Determination proposing increases to its corporate income or franchise tax liability for calendar years 1968, 1969 and 1970. Initially, a Notice of Deficiency Determination was issued on September 14, 1971, for years 1968 and 1969. That determination was amended on March 27, 1973, when additional deficiencies were proposed for each of the initial two years, and a deficiency was also proposed for the calendar year 1970. (In addition, a deficiency for the calendar year 1967 was proposed, was not protested by the taxpayer, and is not in issue in this proceeding).

A protest dated April 12, 1973, was filed with the Commission April 18, 1973, objecting to the proposed deficiencies on the following grounds:

(a) The proposed deficiency incorrectly classified taxpayer and six of its subsidiary or affiliated corporations as a unitary enterprise pursuant to § 63-3027(s), *Idaho Code*. The six subsidiary or affiliated corporations are: (1) Federated Metals Canada Ltd. (2) ASARCO Mercantile Co. (3) Enthone, Inc. (4) International Metal Co. (5) Lone Star Lead Construction Corp. (6) Northern Peru Mining.

(b) The proposed deficiency incorrectly treated certain dividends (including dividends other than those received from the above six corporations), interest, patent royalties,

and capital gains as business income as such term is defined in § 63-3027, *Idaho Code.*

(c) Because the audit was in part conducted by the Multistate Tax Commission, and the Multistate Tax Compact is unconstitutional, the State Tax Commission may not, therefore, base an assessment upon the information obtained in the course of such audit.

In addition, the taxpayer, by a brief or "position" statement, attempted to add an additional objection to a portion of the proposed assessment imposing penalties on taxpayer. Such objection should have been raised by protest; however, it does not appear the staff has been prejudiced by the failure to include such objection in the protest and the protest or objection to the proposed assessment will be considered by the Commission.

The effect of the auditor's adjustment was to treat taxpayer and the six affiliated companies listed earlier in this Decision as a unitary business enterprise, combining such corporations into one entity or unit for accounting purposes, and to utilize the three factor formula provided by § 63-3027, *Idaho Code,* to determine what part of such unitary enterprise's income was properly attributable to Idaho. In addition, the auditor treated dividend income, interest, patent royalties, and capital gains received by members of the unitary enterprise as business income. Finally, the auditor imposed a penalty of 5 percent of the amount of the total deficiency based upon an erroneous reporting of part of a property factor during the year 1968.

The issue of the penalty imposed may be readily disposed of. During 1968 taxpayer had an inventory of ore. The inventory of ore was physically located within the state of Idaho and for Montana tax purposes was reported as being outside Montana, (and presumably within the state of Idaho). However, for Idaho tax purposes the inventory

was reported as not being within the state of Idaho, and such inventory was not included in data supposedly summarizing all Idaho property. There is no evidence indicating that a deliberate or willful misrepresentation to either state was intended; however, the error, while innocent, was not one that would be made by a reasonably prudent accountant in preparing the information needed. § 63-3046, *Idaho Code*, directs the assessment of a 5 percent penalty "if any part of any deficiency is due to negligence or disregard of rules and regulations" and Regulation 45 indicates that "any failure to file a tax return or to pay a tax lawfully due is presumed to be a result of negligence or disregard of the law, rules and regulations". In view of the statute, the penalty might seem to be "automatic"; however, practical experience the Commission has gained in administration of the tax laws of the state of Idaho indicates that each particular situation in which penalties have been assessed should be reviewed closely; we believe the proper objective is to both require full and honest disclosure from taxpayers by making it uneconomical to provide less than full and accurate disclosure, and at the same time not to unduly or unreasonably penalize taxpayers who have diligently attempted to comply with relevant statutes. In the present instance the Commission believes that the penalty should be imposed; however, the amount of the penalty should be restricted to the difference between the taxes due under taxpayer's initial reporting, and the taxes that should have been due if the information had been correctly reported. The effect of such a reduction is to make the penalty in this case commensurate with the magnitude of the error, and not to unduly penalize taxpayer because there were substantial other adjustments made at the same time as the adjustments warranting a penalty.

The remaining two issues are to some extent interrelated. In its protest, taxpayer objects to the treatment of ASARCO itself and the six corporations (hereafter referred to as the unitary subsidiaries) being combined for

accounting purposes. Such protest at some length objects to and points out why the taxpayer does not view such a unitary enterprise to be correct characterization. Later briefs, however, filed by the taxpayer do not treat this issue. In fact, if the Commission has correctly characterized dividends from the non-unitary enterprise corporations as business income, and if in fact the dividends from the unitary enterprise corporations would be business income to ASARCO itself, then the combination of the six unitary enterprise corporations with ASARCO to some extent decreases total tax liability to Idaho.

The doctrine of treating a series of inter-related corporations as a "unitary enterprise" is well established by judicial precedent. The doctrine originated in California, *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S.Ct. 701, *Edison California Stores v. McColgan*, 183 P. 2nd 16 (Calif.) but today has been accepted in a number of jurisdictions. *Zale-Salem, Inc. v. State Tax Commission*, 237 Or. 261, 391 P. 2nd 601 (1964), *Interstate Finance Corp. v. Wisconsin Department of Taxation*, 28 Wis. 2nd 262, 137 N.W. 2nd 38 (1965). We believe § 63-3027(s), *Idaho Code*, was specifically intended to recognize the validity of the concept, which is grounded on the premise that corporations which do not in fact operate as independent business enterprises can only be effectively taxed as unitary business enterprises. In the present instance ASARCO itself characterizes its business in its protest (page 3) as ". . . the business of mining, smelting, refining, manufacturing, buying and selling non-ferrous metals, metalliferous and other mineral products."

While in years past there was some dispute over the point, for the years in question ASARCO itself has not contested the concept that it is engaged in only one business; it has not suggested that as a single company it engages in two or more businesses and it is quite clear from the evidence produced at the hearing that its business activ-

ities are so inter-related as to defy measurement by separate accounting, and to discredit the argument that its business in Idaho consisting of a silver-copper mine, and the exploration and development of ore bodies or mineral deposits, can be separated from ASARCO's worldwide activities.

The auditor suggested the following as indicating that the six unitary corporations are part of a unitary business enterprise consisting of themselves and ASARCO: (a) The wholly owned subsidiaries are engaged either in similar operations to ASARCO's or are conducting manufacturing or sales operations for ASARCO. (b) ASARCO and the unitary corporations have interlocking officers and directors which enables ASARCO to control the subsidiaries' activities and major management decisions. (c) Sales between ASARCO and the subsidiaries are numerous and services are provided between the subsidiaries and parent including management, accounting, budgeting, tax preparation, exploration, research, purchasing, sales and insurance procurement. (d) All of the subsidiaries are entirely owned by ASARCO. A brief description of the affiliated unitary corporations is helpful:

(a) *Federated Metals, Canada.* Effectively, this subsidiary may be characterized as ASARCO's method of doing business in Canada. In Canada it conducts the same business as the Federal Metals division of ASARCO carries on in the United States. The Federated Metals Division of ASARCO specializes in processing or re-processing used metals. It was originally created when ASARCO, during the 1930's, purchased the Federated Metals Company and converted it to a division of ASARCO. The division purchases scrap and also uses metals from its own primary plants when necessary; its main product is alloy metals or usable lead products such as lead rules and sheet lead. The Federated Metals Division of ASARCO does no business in Canada except to sell to Federated Metals, Canada;

Federated Metals, Canada, in turn does no business in the United States. ASARCO has provided capital to Federated Metals; the amount is not known, but interest on the loan from ASARCO to Federated Metals, Canada, varied between $140,000 to $200,000 per year.

(b) *ASARCO Mercantile.* ASARCO Mercantile business consists primarily of purchasing machinery and supplies for resale to other companies within the ASARCO group for resale. It was characterized by the witness for taxpayer as "a purchasing agent". It was set up to "isolate several of (the ASARCO subsidiaries) for Western Hemisphere trade corporation status". [See IRS (1954) Secs. 921 & 922] The prices at which such products would be bought and sold clearly can be effectively controlled by ASARCO management, and it seems to us that under any imaginable test, ASARCO Mercantile is properly categorized as "unitary" as it relates to ASARCO.

(c) *Enthone, Inc.* Enthone, Inc. produces metal finishing chemicals for sale to the metal finishing industry. It was acquired by ASARCO by purchase. Apparently its main business consists of sales of metal plating materials through relatively small commercial customers. Unlike other ASARCO affiliates, Enthone has its own sales force and has a more independent management (only the vice president of Enthone is aiso an officer of ASARCO). There are several members of the board of directors from ASARCO, however. Enthone purchases a part of its supplies and raw materials from ASARCO or other ASARCO affiliates; taxpayer's witness refused to characterize the purchases as "substantial" but did not know the nature of the purchases, which apparently are made from ASARCO's Federated Metals Division. Apparently, if needed supplies are available from ASARCO, they are purchased by Enthone from ASARCO.

(d) *International Metals Co.* International Metals Company business consists of purchasing metals from ASARCO

and resale of such metals overseas (generally in Europe). In fact, from the record made before the Tax Commission, if ASARCO Mercantile may fairly be characterized as a "purchasing agent" then International Metal Company may be fairly characterized as "a selling agent". Its sole function and existence seems to depend upon its activities in selling the ASARCO groups metal products overseas. Goods are sold by International Metal Co. from ASARCO's stock; its purchase from ASARCO and resale is a "paper" transaction and International Metal Co. serves as the conduit or selling agent for the ASARCO group's products. Finally, all of the officers of International Metal Co. are also officers or employees of ASARCO, and function interchangeably in their duties, one minute serving ASARCO, and the next International Metal Co.

(e) *Lone Star Lead Construction Corp.* Lone Star Lead is primarily in the business of installing or servicing lead lining in corrosive chemical tanks. Again, there apparently is common management and needed materials (including lead) are purchased from ASARCO.

(f) *Northern Peru Mining.* Northern Peru Mining conducts its primary business in Peru and it consists of operation of mines yielding lead, copper, zinc and silver. Northern Peru Mining is 100 percent owned by ASARCO; ore is treated in Peru in an initial treatment phase and reduced to a concentrate which contains approximately 25-30 percent copper. The ore during the period in question was then shipped to an ASARCO plant in California for further refining. The ore was processed at the California plant and sold through the ASARCO marketing system. During part of the time apparently all of the ore from the Northern Peru mine was sold to ASARCO; during the entire period most of the ore was sold to ASARCO. Sales to persons other than ASARCO occurred only because of a strike at the ASARCO California plant.

We believe the best statement of the definition or test for a unitary business enterprise was that formulated in *Butler Brothers vs. McColgan,* 111 P. 2d 334, and cited with approval in *Edison California Stores vs. McColgan,* 183 P. 2d 16:

> ". . . the unitary nature of appellant's business is definitely established by the presence of the following circumstances: (1) unity of ownership; (2) unity of operation as evidenced by central purchasing, advertising, accounting and management divisions; and (3) unity of use in its centralized executive force and general system of operation."

In the present instance we find each of the six corporations properly fall within the classification as an integral part of a unitary business enterprise, and they were properly combined by the auditor.

Finally, we must consider taxpayer's objection to the treatment of the following classes of income as business income:

1. Dividends
2. Interest
3. Patent Royalties
4. Gain from sales of capital assets

Very little was said during the hearing, or in briefs submitted by taxpayer or the staff, concerning items other than dividends. We believe that the management of investment and working capital is clearly an integral or regular part of this taxpayer's trade or business, and as the returns indicate, taxpayer received very substantial amounts of interest income (part of it coming from subsidiary corporations). While its direct interest income exceeded its direct income expense, we think on the record made before us that interest received by this taxpayer was received in

the regular course of its trade or business and arose from transactions and activities in the regular course of such trade or business.

The record is also unclear concerning the source and nature of taxpayer's patent royalty income.

We have already outlined the activities and business, and its relationship to that of ASARCO, carried on by the six unitary corporations combined with ASARCO. We would note that even if such companies were not combined with ASARCO, they are clearly inter-related with ASARCO, and dividends paid ASARCO by such companies would clearly be business income. We think it is helpful to outline the nature of the businesses conducted by the remaining corporations paying dividends to ASARCO.

(a) ASARCO Australia is a 100 percent owned subsidiary active in exploring minerals in Australia, and not operating within the United States.

(b) ASARCO Exploration Company is 100 percent owned and involved in mineral exploration activities, primarily outside the United States in Canada and other sections of the Western Hemisphere.

(c) ASARCO Developments is a 100 percent owned subsidiary involved in explorations in New Zealand.

(d) Compania American Smelting, S. A. is a 100 percent owned Chilian company whose activities are to buy ore in Chile. The purchases are made for ASARCO itself. Its character was described as that of a purchasing office for ASARCO; its profits are determined by the difference between the price it pays and the price at which it sells to ASARCO. That price in turn can be controlled by ASARCO, who owns the company and has the power to appoint officers and management.

(e) Lake Asbestos of Quebec, Ltd. is a 100 percent owned subsidiary involved in mining and sale of asbestos.

ASARCO International is a selling agent for Lake Asbestos and is a 100 percent owned subsidiary. Apparently its primary sales are in Europe; it is unclear whether they sell elsewhere.

(f) Southern Peru Copper is a 51.5 percent owned corporation. ASARCO has the power to appoint six of thirteen directors in Southern Peru Copper. Six of the remaining seven directors are appointed by other shareholders in the corporation and the thirteenth director apparently is chosen by the twelve appointed by ASARCO and other shareholders. ASARCO is the largest single shareholder; it indicates that the remaining three shareholders, owning the remainder of the stock, refuse to participate in the company unless assured that they would have a way to assure that management would not be completely dominated by ASARCO. Each company is entitled to purchase output from the mine in proportion to its stock ownership. ASARCO, for example, would be entitled to purchase 51.5 percent of available copper for sale. The product of the mine is "blister copper", which is copper that has been smelted and is approximately 97 percent pure. Blister copper, however, is not marketable, and must be refined before it can be commercially marketed. This refining, in the case of copper sold to ASARCO, is done in the United States at ASARCO refineries. ASARCO originally owned the mining property, and required approximately 235 million dollars to put it into production. ASARCO and the remaining three shareholders obtained loans from the Export-Import Bank and outside financing to develop the mine. ASARCO hopes that ownership or partial ownership of Southern Peru Copper Corporation will assure it of a long-term supply of copper, since physically there is a long-term supply of copper. The supply is dependent upon the political climate in Peru in that the mine could be ex-propriated by the Peruvian government.

(g) M.I.M., which apparently is a holding company for Mount Isa Mines, is a 52.7 percent controlled subsidiary. The company owns a large mine in Australia which produces gold, silver, lead, copper and zinc. The company owns smelters and a refinery in Australia and a substantial part of their product is sold in Japan and Europe. Sales to ASARCO are extremely limited; apparently they amount to no more than a few thousand dollars per year.

(h) Neptune Mining is a 51.8 percent owned subsidiary. During the years in question the company was involved in gold mining in Nicaragua; subsequent to those years the gold mining had been discontinued but lead and copper is being mined. The output of Neptune Gold mining is in the form of concentrates which are sold to ASARCO and refined and smelted at ASARCO's plants.

(i) ASARCO Mexicana, S. A. is a 49 percent owned subsidiary and apparently conducts the same business in Mexico that ASARCO carries on in the United States. In the words of the witness for ASARCO, the two businesses are "parallel". The remaining 51 percent of the stock in the company is owned by a group of Mexican citizens and the remaining ownership is scattered so that ASARCO is the largest single stockholder in the company. Products from ASARCO Mexicana, S. A. are sold to ASARCO.

(j) Mexicana de Cobra S. A. owns the mineral lands upon which ASARCO Mexicana operates.

In addition to the foregoing inter-relationships, ASARCO itself provides services to its subsidiaries. Subsidiaries are subjected to a charge from ASARCO for management, which is apportioned on the basis of direct costs. The witness from ASARCO was unable to indicate how these costs were determined or apportioned. ASARCO in past times apparently has provided substantial financing to the subsidiaries, or some of them. During the period, loans were made to Federated Metals. In general, ASARCO pays offi-

cers' salaries for all companies; the officers in fact are employees of ASARCO. Generally there is a common employee retirement plan; however, Northern Peru's is separate so also is that of Enthone and Federated Metals. ASARCO Mercantile had *no* employees of its own nor did International Metals.

ASARCO has a single required source for insurance; it has an arrangement to purchase insurance through a broker located at or near its headquarters building, and receives favorable rates because of its volume of purchase of insurance for itself and its subsidiaries. ASARCO maintains financial records for most of the subsidiaries except Northern Peru, Lake Asbestos and possibly Enthone. However, even these companies receive technical advice and some accounting services, and services in connection with preparing consolidated financial records and tax returns, from ASARCO itself.

ASARCO provides legal services for all of the subsidiaries.

Finally, and perhaps most important for an enterprise active in the mining and development of metals, ASARCO provides exploration and development services for the subsidiaries through its own exploration and development department, or through the subsidiary exploration and development companies.

Taxpayer strenuously argues that all dealings between the various companies were conducted "at arm's length" (which is an extremely tenuous argument since in many instances one officer was dealing for both of the "negotiating" parties as the agent of both companies) or at least such transactions were conducted at fair or reasonable prices. The argument mixes the very essence of formulary apportionment, which is that where there are integrated, interdependent steps in the economic process carried on by a business enterprise; there is no logical or viable method

for accurately separating the profit attributable to one step in the economic process from other steps. Essentially, formulary apportionment is necessary because inherent difficulties or impossibilities are present in seeking to divide the profits of a company like ASARCO where producing, manufacturing, and marketing are conducted by the same company but take place in different states. The argument for taxpayer is not strengthened by considering whether each of the separate manufacturing processes or steps could be conducted entirely separate from the remaining steps; if this took place, the Commission would not be attempting to measure a tax due from ASARCO and the unitary corporations with the strengths and weaknesses of an integrated operation that may commence in Peru and end in sale of products in Europe; the Commission would be faced with an entirely different taxpayer. We conclude that any attempt to separate out the profits of integrated steps of a business enterprise is unrealistic and futile. The problem is not merely one of measurement of what a component part might make if it were operated as a separate business; it is measurement of an integrated business enterprise.

The final major issue presented is whether income received by taxpayer in the form of dividends is properly apportioned as business income on the basis of the factors prescribed by § 63-3027, *Idaho Code*, or whether such income should be allocated to taxpayer's commercial domicile or some other state in its entirety.

The controversy seems to hinge on two questions:

1. Under § 63-3027, *Idaho Code*, is the income properly classified as "business income" or "nonbusiness income".

2. If the income in question is properly classified as "business income" does apportionment of such income offend the United States Constitution.

We find that the dividend income in question constitutes business income within the meaning of § 63-3027(a)(1), *Idaho Code*. "Business income" is defined as:

> ". . . income arising from transactions and activity in the regular course of taxpayers' regular business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitutes integral or necessary parts of the taxpayers' business operations. Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation shall be presumed to be income from intangible property, the acquisition, management, or disposition of which constitute an integral part of the taxpayers' trade or business; such presumption may only be overcome by clear and convincing evidence to the contrary."

It seems clear that § 63-3027, *Idaho Code*, does not provide for automatic allocation to commercial domicile of all dividends, and provides only for allocation of dividends when they constitute "nonbusiness income".

> "Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, *to the extent that they constitute nonbusiness income*, shall be allocated . . ." § 63-3027(d), *Idaho Code*.

(For the year 1968, the last sentence of § 63-3027(a)(1) reads:

> "Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation in which the taxpayer owns or has the right to acquire, directly or indirectly, more than five per cent (5%) of the voting stock shall be presumed to be income from intangible property, the acquisition, man-

agement, or disposition of which constitute an integral part of the taxpayers' trade or business, such presumption may only be overcome by clear and convincing evidence to the contrary."

The change does not appear to be material in the present controversy since in all cases taxpayer owned 5 percent or more of the voting stock of the subsidiaries in question.)

Taxpayer has not shown by clear and convincing evidence that the acquisition, management, or disposition of the dividend paying subsidiaries in question does not constitute an integral part of its trade or business, and we find that the dividend income was business income.

The legislature has provided that as to income from dividends or capital gains on stocks, such income is presumed to be business income unless such presumption is overcome with clear and convincing evidence to the contrary. We do not believe by such provision the legislature intended to change the general principle that in situations such as the present the taxpayer must carry the burden of proof. It cannot be inferred that since the taxpayer must establish dividend income as nonbusiness income by clear and convincing evidence, that the Commission establish that other categories of income are business income. We think instead that the legislature only meant to provide a different standard of proof for the taxpayer in the case of dividend income and capital gains on stock.

Passing to the second question we see presented by this controversy, we do not believe that treating the income in question as business income offends the United States Constitution. If dividend income is to be taxed, there would seem to be two alternatives. The income can be treated as being earned at the "commercial domicile" of the corporation. The effect of such treatment is to arbitrarily assign to the state of commercial domicile one of the largest categories of income received by a large multistate taxpayer.

The concept of taxing all dividend income at the taxpayer's commercial domicile is a remnant of a fiction developed at an earlier date that the "situs" of an intangible was at a corporation's commercial domicile, which was very emphatically rejected by the Idaho Supreme Court in *John Hancock Mutual Life Insurance Co. vs. Neil,* 79 Idaho 385; and in *Futura Corporation vs. State Tax Commission,* 92 Idaho 288. The Supreme Court of the United States itself has not given support in its more recent decisions to the automatic assignment of intangible income to a taxpayer's commercial domicile, and we know of no case decided by the United States Supreme Court holding that income from intangibles must be assigned to the taxpayer's commercial domicile and cannot be assigned to other states. If a taxpayer has 10 percent of its assets, and its commercial domicile in state A, and 90 percent of its assets in state B, it is at least as reasonable to assume that 90 percent of its intangibles should be assigned to state B and 10 percent of its intangibles should be assigned to state A, as it is to automatically assume that all intangibles are held in state A. In fact, the key characteristic of an intangible is that is [sic] has no physical existence and has no physical location.

Whatever may be proper in the case of a taxpayer conducting a separate and distinct business operation involving investments and receipt of dividends, we think that where intangibles, or an investment in subsidiaries, is used as an integral and necessary part of the conduct of a taxpayer's trade or business the income is business income.

Finally, taxpayer contends that because the audit was in part conducted by the Multistate Tax Commission the proposed assessment is therefore invalid. Taxpayer does not further expound upon this principle in its brief and we are unable to follow the argument. We suppose the constitutionality is questioned because it is a compact between two or more states and because as might seem to be required by Article 1, Section 3 of the United States Con-

stitution, consent by Congress has not been given. The argument has not been briefed by taxpayer or the staff, nor are we convinced that this Commission is the proper tribunal to determine the constitutionality of statutes duly enacted by the state legislature. However, we need not face that question; even assuming the compact be unconstitutional, it would by no means follow that the Commission could not utilize the fruits of an audit conducted by Multistate Tax Commission personnel.

WHEREFORE, the State Tax Commission hereby ORDERS that the Notice of Deficiency Determination dated September 14, 1971, and amended March 27, 1973, as herein modified, and which modification is shown on Exhibit "A" attached hereto, be hereby APPROVED, AFFIRMED and MADE FINAL.

DATED this 2nd day of July, 1974.

IDAHO STATE TAX COMMISSION

/s/ DON G. LOVELAND
Chairman

Orig: File
ccrr: Taxpayer (R.R. #11,551)

(Certificate Omitted in Printing)

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12198

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff-Respondent,

v.

IDAHO STATE TAX COMMISSION,
Defendant-Appellant.

REMITTITUR

Justice Bakes announced the decision in this cause March 12, 1969, to the effect that the judgment of the District Court of the Fourth Judicial District of the State of Idaho, Ada County, is reversed and remanded for further proceedings as set forth in the opinion.

IT IS NOW THEREFORE SO ORDERED.

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the attached and foregoing is a true and correct copy of the opinion filed in the above entitled cause April 3, 1979, and now of record in my office.

WITNESS My hand and the seal of this Court April 3, 1979.

R. H. Young, Clerk

/s/ By: JUDY E. CIZMISH
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12198

AMERICAN SMELTING AND REFINING COMPANY, *Plaintiff-Respondent,*

v.

IDAHO STATE TAX COMMISSION, *Defendant-Appellant.*

REMITTITUR

The Court, by per curiam opinion, on reargument on remand from the United States Supreme Court, announced the decision in this cause March 4, 1981, reinstating the Court's prior opinion, filed March 12, 1979, to the effect that the judgment of the District Court of the Fourth Judicial District of the State of Idaho, Ada County, is reversed and remanded as set forth in the opinion.

IT IS NOW THEREFORE SO ORDERED.

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the judgment entered in the above entitled cause March 26, 1981, and now of record in my office.

WITNESS my hand and the Seal of this Court March 26, 1981.

R.H. YOUNG *Clerk*

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF IDAHO

Case No. 12198

Notice Of Appeal To The Supreme Court
Of The United States

AMERICAN SMELTING & REFINING CO., *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appelle.*

NOTICE IS HEREBY given that American Smelting and Refining Company (ASARCO) the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Idaho entered on March 4, 1981, reinstating the prior opinion and order of that Court after remand for further consideration in light of the decision of the United States Court in Mobil Oil.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED this 18th day of May, 1981.

PHILIP E. PETERSON, P.A.
Philip E. Peterson, P.A.
318 Fifth Street
Lewiston, Idaho 83501

LEE, TOOMEY & KENT
George W. Beatty and
William L. Goldman
Suite 812
1200 - 18th Street NW
Washington, D.C. 20036

Counsel for Appellant

Filed May 18, 1981

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the *Notice of Appeal* entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 5/18/81

R.H. YOUNG *Clerk*

By: MARILYN BOURNE *Deputy*

IN THE SUPREME COURT OF THE STATE OF IDAHO

Case No. 12198

Notice Of Appeal To The Supreme Court
Of The United States

AMERICAN SMELTING & REFINING CO., *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appelle.*

NOTICE IS HEREBY given that American Smelting and Refining Company (ASARCO) the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Idaho entered on March 4, 1981, reinstating the prior opinion and order of that Court after remand for further consideration in light of the decision of the United States Supreme Court in Mobil Oil.

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1200 - 18th Street NW
Washington, D.C. 20036

Counsel for Appellant

Filed May 18, 1981

State of Idaho
County of Ada
SS.

I, John Bastida, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the copy on file in this office.

In witness whereof, I have hereunto set my hand and affixed my official seal this 18 day of May, 1981.

JOHN BASTIDA,
Clerk of the District Court

By: BONNIE E. BUTTON *Deputy*

APPENDIX D

Idaho Code § 63-3027

63-3027. COMPUTING TAXABLE INCOME OF NONRESIDENT PERSONS AND ANY CORPORATIONS.—The Idaho taxable income of a nonresident person with business situs in this state or any corporation with a business situs in this state shall be computed and taxed in accordance with the rules set forth in this section:

(a) As used in this section, unless the context otherwise requires:

(1) "Business income" means income arising from transactions and activity in the regular course of the taxpayers' trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute integral or necessary parts of the taxpayers' trade or business operations. Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation [in which the taxpayer owns or has the right to acquire, directly or indirectly, more than five per cent (5%) of the voting stock] shall be presumed to be income from intangible property, the acquisition, management, or disposition of which constitute an integral part of the taxpayers' trade or business; such presumption may only be overcome by clear and convincing evidence to the contrary.

(2) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(3) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(4) "Nonbusiness income" means all income other than business income.

(5) "Sales" means all gross receipts of the taxpayer not allocated under subsections (d) through (h) of this section.

(6) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(b) Any taxpayer having income from business activity which is taxable both within and without this state shall allocate and apportion such net income as provided in this section.

(c) For purposes of allocation and apportionment of income under this section, a taxpayer is taxable in another state if:

(1) In that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or

(2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(d) Rents and royalties from real or tangible personal property, capital gains interest, dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in subsection (e) through (h) of this section.

(e)(1) Net rents and royalties from real property located in this state are allocable to this state.

(2) Net rents and royalties from tangible personal property are allocable to this state:

(i) If and to the extent that the property is utilized in this state, or

(ii) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(f)(1) Capital gains and losses from sales of real property located in this state are allocable to this state.

(2) Capital gains and losses from sales of tangible personal property are allocable to this state if:

(i) the property had a situs in this state at the time of the sale, or

(ii) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(3) Capital gains and losses from sales of intangible personal property are allocable to this state if

the taxpayer's commercial domicile is in this state, unless such gains and losses constitute business income as defined in this section.

(g) Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state unless such interest or dividends constitute business income as defined in this section.

(h)(1) Patent and copyright royalties are allocable to this state:

(i) if and to the extent that the patent or copyright is utilized by the payer in this state, or

(ii) if and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(2) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patent product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(i) All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3).

(j) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(k) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight (8) times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(l) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period, but the [tax collector] *state tax commission* may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(m) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the tax period.

(n) Compensation is paid in this state if:

(1) the individual's service is performed entirely within the state; or

(2) the individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(3) some of the service is performed in the state and

(i) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or

(ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(o) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

(p) Sales of tangible personal property are in this state if:

(1) the property is delivered or shipped to a purchaser other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale, or

(2) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and

(i) the purchaser is the United States government or

(ii) the taxpayer is not taxable in the state of the purchaser.

(q) Sales, other than sales of tangible property, are in this state, if:

(1) the income-producing activity is performed in this state; or (2) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

(r) If the allocation and apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the [tax collector] *state tax commission* may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting, provided that only that portion of general expenses clearly identifiable with Idaho business operations shall be allowed as a deduction;

(2) the exclusion of any one or more of the factors;

(3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(s) For purposes of this section a parent and subsidiary corporation may, when necessary to accurately reflect income, be considered a single corporation.

(t) In computing the taxable income of a part-year or nonresident individual, trust or estate, the [optional standard deduction as defined in section 141 of] *stand-*

ard deductions as allowed by the Internal Revenue Code, if applicable, the exemptions as defined in section 151 of the Internal Revenue Code, and the Federal Income Tax deduction shall all be allowed in the proportion that the adjusted gross income of the taxpayer from Idaho sources bears to the total adjusted gross income from all sources before any deductions therefrom. The adjusted gross income, as used in this subsection, shall mean adjusted gross income as defined in section 62 of the Internal Revenue Code with adjustments for necessary additions and subtractions of income under this act.

SECTION 10. That Section 63-3031, Idaho Code, be, and the same is hereby amended to read as follows:

(Bracketed material deleted in 1969 pursuant to Section 9, Chapter 19, Session Laws of 1969.)

APPENDIX E

DIVIDENDS

	1968	1969	1970
Federated Metals of Canada	$ None	$ None	$ None
ASARCO	12,500	15,000	140,000
Mercantile			
Enthone, Inc.	340,000	400,000	940,000
Int'l. Inc.	50,000	200,000	
Lone Star Lead	80,000	80,000	160,000
No. Peru Mining Corp.	1,750,000	2,450,000	1,750,000
Compania American Smelting	15,687	26,385	
Lake Asbestos of Quebec, Ltd.	1,120,670	2,525,000	2,475,000
ASARCO Int'l. Corp.	70,000	80,000	135,000
So. Peru Copper Corp.	25,787,904	32,234,880	18,132,120
M.I.M. Holdings, Ltd.	9,661,070	20,466,130	33,647,396
ASARCO Mexicana, S.A.	1,882,918	1,882,918	1,882,918
General Cable	5,818,308	5,333,449	2,100,763
Revere Copper	2,814,444	2,814,444	2,345,370
Hecla Mining	91,729	46,242	11,561
Kennecott Copper Corp.	243,908	285,490	283,280
Phelps Dodge	269,850	300,690	323,820
Cia Minera de San Asidro y Anoyas, S.A.	50,557	—0—	—0—
Cia. Metalurgia Mex.	337,500	300,000	330,000
Japan Metal Finishing	8,454	6,081	11,383
Zinc Ind. S.A.	131,527	40,993	86,359
Pernix Enthone, S.A.		24,126	
Apache Power	5,600	7,600	8,000
TOTALS	$50,542,626*	$69,519,428*	$64,762,970*

UNITIZED

* Total as shown in Federal Return for ASARCO

INTEREST

	1968	1969	1970
U.S. Government Securities	$1,182,989	$1,749,007	$2,239,199
United Park City Notes	12,000	12,000	12,000
Eisma Notes (sale of ASARCO Mexicana stock)	506,000	363,000	242,000
State and Local Bonds	330,489	672,635	111,023
Federated Metals of Canada, Ltd.		132,092	260,854
Revere Copper and Brass 5½% convertible debentures	1,251,965	1,251,965	1,251,965
N.Y. & Honduras Mining Co. Notes	24,559		
Bank Interest (fixed deposits)	63,306		
U.S. Reduction Corp. Notes		68,861	132,690
Sunshine Mining Company Notes		20,277	
Clayton Silver Mines Notes			25,375
Interest in connection with General Cable Sale			1,051,004
Neptune Gold Mining Note			4,673
Moran Notes (sale of Los Angeles plant)			56,250
Tax Refunds		17,579	329,296
Other Marketable Securities *	887,565	1,590,027	1,191,495
Other Interest Income	24,094	29,293	111,900
TOTALS	$4,282,917	$5,906,736	$7,019,724

See footnote on page 73

CAPITAL GAINS

	1968	1969	1970
Sale of M.I.M. Stock	$4,487,203	$2,230,370	$
Sale of Cia Minera de San Asidro y Aneyas stock	(645,817)		
Sale of Hecla Stock	3,753,251		141,098
Sale of U.S. Bonds (includes Federal Land Bank bonds)	118,906	81,406	
Sale of State & Local Bonds and notes	(1,723)	113,950	
Sale of Land, Buildings & Equipment**	16,232	98,089	51,952
Sale of U.S. Treasury Bonds			302,187
Sale of Connecticut 2¼% Bonds			16,844
Sale of General Cable Stock			45,482,303
Sale of Zinc Industrial, S.A.			406,207
TOTALS	$7,728,052*	$2,523,815*	$46,400,591*

* This is also reported on the ASARCO federal return.

** These represent Section 1245 recapture sales of property used in the business and are reported as ordinary income.

* *Other Marketable Securities:*			
Bankers Acceptances	$ 135,568	$ 360,833	$ 98,952
Time Certificates of Deposit	83,007	61,076	347,376
Commercial Paper Notes	668,990	1,168,118	746,402
	$ 887,565	$1,590,027	$1,192,760
Less amortization (time certificate deposits)			(1,265)
TOTAL ABOVE	$ 887,565	$1,590,027	$1,191,495

APPENDIX F

Appendix F to Jurisdictional Statement in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223 (1980)

Appendix F

ALLOCATION OR APPORTIONMENT OF DIVIDENDS INCLUDED IN THE TAX BASE*

State[1]	All Taxable Dividends Allocated to Commerical Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
Alabama		X	
Alaska		X	
Arizona	X		
Arkansas		X	
California	X		
Colorado		X	
Delaware			X
District of Columbia		X	
Hawaii		X	
Idaho		X	
Illinois		X	

* This table includes only jurisdictions which include foreign source dividends, in part or in whole, in the tax base. Georgia, Florida and Ohio have been omitted because foreign source dividends are not taxable (Ga. Code §92-3102, CCH 10-512, 11-512), or they are taxable only if the payor transacts a substantial portion of its business, or has a substantial portion of its assets in the United States (Fla. Stat. §220.13, CCH 10-310), or has physical assets located in the State (Ohio Rev. Code Ann. §5733, CCH 10-309, 336, 378, 11-425).

[1] Ala. Code Tit. 40, §40-18-34, CCH 10-535, 15-090; Alaska Stat. §§43.19.010, 43.20.065, CCH 12-417, 418; Ariz. Rev. Stat. §43-135(g), CCH 12-405; Ark Stat. Ann. §§84-2055(a), 2058, 2061, 2063, CCH 11-537, 572; Cal. Rev. & Tax. Code, §25126, CCH

State[1]	All Taxable Dividends Allocated to Commerical Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
Indiana		X	
Kansas		X	
Louisiana	X		
Maine		X	
Maryland			X
Massachusetts			X
Minnesota	X		
Mississippi	X		
Montana		X	
Nebraska		X	

12-428; Colo. Rev. Stat. §24-60-1301, CCH 12-538; Del. Code Tit. 30, §1903(b)(6), CCH 10-840; D.C. Code §47-1580(a), CCH 12-405, 413; Haw. Rev. Stat. §§235-22, 27, 29, CCH 12-530, 540; Idaho Code §63-3027(g), (i), CCH 12-490, 510; Ill. Rev. Stat. Ch. 20, §301, 304, CCH 90-907, 916; Ind. Code Ann. §6-3-2-2, CCH 12-405, 415, 448; Kan. Stat. §§79-3274, 3277, 3279, CCH 12-478, 490; La. Rev. Stat. Ann. §243, CCH 12-411; Me. Rev. Stat. Tit. 36, §§5211(6), (8), CCH 12-460, 465; Md. Ann. Code Art. 81, §316(c), CCH 12-410, 420; Mass. Gen. Laws Ann. Ch. 63, §38(a) (1), (c) CCH 10-324, 330; Minn. Stat. §290.17, CCH 12-407; Miss. Code Ann. §27-7-23(1)(a); Miss. Inc. Tax Reg. §1.27-7-23(1), CCH 12-405, 407, 435; Mont. Rev. Codes Ann. §84-1503, CCH 11-501(c), (f), (h); Neb. Rev. Stat. §77-2735(4), 2741, 2743, CCH 12-425, 445, 455; N.H. Rev. Stat. Ann. §77-A:3, CCH 15-350, 355; N.J. Rev. Stat. §54:10A-6, CCH 5-805, 810; N.M. Stat. Ann. §§72-15A-20, 23, CCH 12-425, 455, 465; N.C. Gen Stat. §105-130.4(c), (f), (i), CCH 10-805, 820; N.D. Cent. Code §57-38.1, CCH 12-454, 460, 464; Okla. Stat. Tit. 68, §2358A, CCH 12-425; Or. Rev. Stat. §314.625, 640, 650, CCH 12-414, 418, 422; R.I. Gen. Laws §44-11-14, CCH 10-810; S.C. Code §12-7-1120, CCH 12-435; Tenn. Code Ann. §67-2709, 2712, 2714, CCH 12-419, 425, 429; Utah Code Ann. §59-13-81, 84, 86, CCH 11-515, 530, 540; Vt. Stat. Ann. Tit. 32, §5833(a), CCH 12-410; Wis. Stat. Ann. §71.07(1m) (2), CCH 12-404(a), 409. All CCH references are to the relevant paragraphs in the Commerce Clearing House, Inc. State Tax Reporter Service.

State[1]	All Taxable Dividends Allocated to Commerical Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
New Hampshire			X
New Jersey			X
New Mexico		X	
North Carolina		X	
North Dakota		X	
Oklahoma	X		
Oregon		X	
Rhode Island			X
South Carolina	X		
Tennessee		X	
Utah		X	
Vermont			X
Wisconsin			X
Total[2]	7	19	8

[2] Four States that tax foreign source dividends have been omitted from the table because their methods of allocation or apportionment do not fit into the scheme used by most States.

Connecticut: Allocates dividends from subsidiaries by reference to the ratio of the payor's business done in the State; non-subsidiary dividends are apportioned if they constitute an integral part of the recipient's regular business operations (Conn. Gen. Stat. §12-218, CCH 10-815, 825).

Iowa: There appears to be a conflict between the statute and the rules as to the extent to which dividends are allocated or apportioned (Iowa Code §422.33, CCH 12-520; Iowa Rule 54.2(1), CCH 12-522).

New York: Includes in the tax base only non-subsidiary dividends (to the extent of 50%), which it allocates in the ratio of the payor's New York apportionment percentages (N.Y. Tax Law §210, CCH 5-829—841, 9-581).

Virginia: Dividends of non-subsidiaries are allocated to the State if it is the recipient's commercial domicile; dividends paid by subsidiaries are apportioned (Va. Code §58-151.040, CCH 12-445).

Office - Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS

No. 80-2015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASARCO INCORPORATED (formerly THE AMERICAN SMELTING AND REFINING COMPANY),
Appellant,

v.

IDAHO STATE TAX COMMISSION,
Appellee.

Appeal from the Supreme Court of Idaho

JOINT APPENDIX

GEORGE W. BEATTY
(Counsel of Record)
C. RUDOLF PETERSON
WILLIAM L. GOLDMAN
JAMES A. RIEDY
1200 - 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501

Counsel for Appellant

DAVID H. LEROY
Attorney General

THEODORE V. SPANGLER, JR.
Deputy Attorney General
(Counsel of Record)
State Tax Commission
P.O. Box 36
Boise, Idaho 83722
(208) 334-4560

Counsel for Appellee

Appeal Docketed May 29, 1981

Probable Jurisdiction Noted October 5, 1981

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RELEVANT DOCKET ENTRIES

REGISTER OF ACTIONS
DISTRICT COURT
ADA COUNTY, IDAHO

Case No. 53182

AMERICAN SMELTING AND REFINING CO., *Plaintiff*

IDAHO STATE TAX COMMISSION, *Defendant*

Date Filed Mo., Day, Yr.	Papers Filed, Issued or Lodged
July 25 1974	Complaint filed, Summons issued
July 25 1974	Surety Bond
Aug. 7 1974	Summons and affidavit of service
Aug. 15 1974	Notice of Appearance
Aug. 26 1974	Answer
Aug. 26 1974	Note of Issue—Court
Jan. 30 1975	Stipulation
Jan. 30 1975	Pre-trial Order and Acceptance
Sept. 30 1975	Order for hearing
Nov. 13 1975	Memorandum
Nov. 13 1975	Certificate of mailing
Jan. 15 1976	Findings and conclusions
Jan. 22 1976	Judgment
Mar. 11 1976	Notice of Appeal
Mar. 15 1976	Praecipe
Mar. 18 1976	Clerk's Certificate of Estimated Costs

Date Filed

Mo., Day, Yr. Papers Filed, Issued or Lodged

Mar. 12 1979—Supreme Court Opinion reversing & remanding

Apr. 10 1979—Remittitur

May 24 1979—Notice of Appeal to U. S. Supreme Court

May 24 1979—Certificate of Service

May 30 1979—Amended Notice of Appeal to the Supreme Court of the United States

May 30 1979—Certificate of Service

Mar. 5 1981—Supreme Court Opinion Reinstating Prior Opinion

Mar. 27—Remittitur

May 18 1981—Notice of Appeal to the U. S. Supreme Court

IDAHO SUPREME COURT

Docket No. 12198 S

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff-Respondent,

v.

IDAHO STATE TAX COMMISSION,
Defendant-Appellant.

Date	Register-of-Actions	203 Entries

03/12/76—Filed Notice of Appeal. NC & C.

03/19/76—Filed Clerk's Certificate. NC & C.

04/09/76—Filed Reporter's Transcript (1 Vol). NC & C.

04/09/76—Filed Clerk's Record (1 Vol).

04/09/76—Received Exhibits **large envelope**

04/30/76—Filed Stip. re Extens. of Time to 6-10-76 to File App. Brief.

04/30/76—Entered Order Approving Stipulation Filed 4-30-76. NC.

06/14/76—Filed Stip. and Order re Extens. of Time to 7-23-76 to File App. Brief.

07/22/76—Filed Appellant's Brief. CM. NC.

08/13/76—Filed Petition to Appear as Amicus Curiae by Eberle, Berlin, Kading, Turnbow & Gillespie on Behalf of United States Steel Corp. for the Purpose of Submitting Additional Authorities, Oral Argument and Theories.

08/16/76—Entered Order Granting Petition Filed 8-13-76 with Brief to be Filed Within 30 Days. NC.

Date Register-of-Actions

09/28/76—Filed Stip. re Extens. of Time of 30 Days (10-18-76) to File Amicus Curiae Brief; 10-28-76 to File Res. Brief; and Until 11-22-76 to File App. Reply Brief.

09/28/76—Entered Order Approving Stipulation Filed 9-28-76. NC.

10/21/76—Filed Amicus Curiae Brief (United States Steel Corp.). CM. NC.

10/29/76—Filed Respondent's Brief. CM. NC.

11/12/76—Filed Stip. re Extens. of Time to 1-6-77 to File App. Reply Brief. CM.

11/15/76—Entered Order Approving Stipulation Filed 11-12-76 to "12-13-76 only". NC.

11/23/76—Filed Motion to Appear as Amicus Curiae by Multistate Tax Commission for Purposes of Filing a Brief. CM. NC.

12/01/76—Filed Stip. re Extens. of Time to 1-6-77 to File App. Reply Brief.

12/01/76—Entered Order Approving Stipulation Filed 12-1-76. NC.

12/09/76—Entered Order Granting Motion Filed 11-23-76 Amicus Curiae Brief (Multistate) Due 1-1-77. NC.

12/27/76—Filed Amicus Curiae Brief (Multistate Tax Commission). CM. NC.

01/05/77—Filed Appellant's Reply Brief. CM. NC.

01/21/77—Filed Motion by Res. to File Brief in Response to Brief of Amicus Curiae, Multistate Tax Commission. CM. NC.

Date Register-of-Actions

01/28/77—Entered Order Granting Motion Filed 1-21-77. NC.

03/17/77—Filed Res. Reply Brief to Brief of Amicus Curiae Multistate Tax Commission. CM. NC.

11/02/77—Entered Order Setting Case for Hearing on the Merits 9 a.m., Dec. 5, 1977. In Boise.

11/10/77—Filed Motion by App. for Enlargement of Time for Oral Argument of 60 Minutes per Side and Permitting all Amicus Curiae to Participate in Oral Argument. CM. NC.

11/18/77—Entered Order Granting Motion Filed 11-10-77 to 45 Minutes per Side for Oral Argument and any Amicus Curiae Argument Must Constitute a Part of the 45 Minutes Allotted to Each Side. NC.

11/22/77—Filed Motion by App. to Allow Appearance of William D. Dexter, Attorney for Multistate Tax Commission, Amicus Curiae, in This Appeal, for Purposes of Oral Argument. CM. NC.

11/28/77—Filed Motion by Res. to Allow Appearance of George Beatty, Attorney of WN., D.C., for Limited Purposes of Oral Argument on Behalf of Res. CM. NC.

11/28/77—Entered Order Granting Motion Filed 11-22-77. NC. Dist.

11/28/77—Entered Order Granting Motion Filed 11-28-77. NC. Dist.

12/08/77—File Letter from App. Citing Certain Cases as Requested by the Court During Oral Argument. NC. Dist.

12/05/77—Mr. Peterson Moved Admission of George Beatty, a Member in Good Standing in the State Bar

Date Register-of-Actions

of Michigan, for the Purposes of Making Oral Argument in This Case. Motion Granted.

12/05/77—Entered Order—This Case Being Fully Argued, a Written Opinion Will Issue in Due Time.

03/12/79—Filed Case Opinion. NC, J, Judge Callister & C.

04/03/79—Filed Remittitur Reversing and Remanding Judgment for Further Proceedings as Set Forth in Opinion. NC, J & C.

04/03/79—Returned Exhibits w/Remittitur. Via Statehouse Mail.

04/03/79—Released to West Publishing.

05/23/79—Filed Notice of Writ of Certiorai by Res. CM. NC. Dist.

05/30/79—Filed Amended Notice of Writ of Certiorai by Res. w/Attachment. CM. NC. Dist.

03/28/80—Received Letter from Theodore V. Spangler, Dep. Atty. Gen. for the State Tax Commission, Stating He Has Received Information That the U. S. Supreme Court Has Vacated the Idaho Court's Judgment and Remanded the Case to the Idaho Court for Further Consideration in Light of *Mobil Oil Corporation v. Commissioner of Taxes of Vermont* (Docket No. 78-1201, Decided 3-19-80). Dist.

04/02/80—Received Letter from Philip E. Peterson, Counsel for Res., re U. S. Supreme Court Ruling and Suggesting That the Case Should be Briefed and Argued Before This Court. (w/Attached Copy of U.S. Supreme Court Decision). Dist.

04/28/80—Filed Order of U. S. Supreme Court Remanding Cause in Light of *Mobil Oil Corporation v.*

Date Register-of-Actions

Commissioner of Taxes of Vermont, 445 U.S. —— (1980). NC. Dist.

05/02/80—Entered Order This Case Having Been Remanded by the Supreme Court of the United States to the Idaho Supreme Court on the 24th Day of March, 1980, for Further Consideration in Light of *Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 445 U.S. (1980), It Is the Order of the Idaho Supreme Court That the Parties Hereto Shall Each, in Accordance with Rule 34 of the Idaho Appellate Rules, Submit Briefs to This Court Addressing the Necessity for Further Action of This Court. NC.

05/23/80—Filed Stipulation as to Briefing in That App. Brief Would Be Filed on or Before 8-6-80; Res. Brief on or Before 9-16-80; and App. Reply Brief on or Before 10-1-80.

05/27/80—Entered Order Approving Stipulation Filed 5-23-80. NC. Distributed.

05/27/80—Set *due date*—Res. Opening Brief on Remand 8-6-80.

05/27/80—Set *due date*—App. Brief on Remand 9-16-80.

05/27/80—Set *due date*—Res. Reply Brief on Remand 10-1-80.

07/11/80—Filed Motion for Extens. of Time to 10-01-80 to File Resp. Opening Brief on Remand. NC.

07/30/80—Entered Order Granting Motion Filed 7-11-80. NC.

07/30/80—Reset *due date*—Res. Opening Brief on Remand Due 10-1-80.

Date Register-of-Actions

07/30/80—Reset *due date*—App. Brief on Remand Due 11-12-80.

07/30/80—Reset *due date*—Res. Reply Brief on Remand Due 11-26-80.

07/30/80—Filed Affidavit in Support of Motion for Ext. of Time Filed on 7-11-80. CM. NC.

10/06/80—Filed Respondent's Opening Brief on Remand. CM. NC. Dist.

10/21/80—Filed Stip. Motion re Extens. of Time to 12-5-80 to File App. Brief on Remand.

10/24/80—Entered Order Granting Motion Filed 10-21-80. NC.

11/14/80—Filed Motion to Appear as Amicus Curiae by Multistate Tax Commission for Leave to Appear on Its Own Behalf and on Behalf of the States Joining in the Brief of the Multistate Tax Commission for the Purpose of Filing a Brief. CM. NC.

12/04/80—Filed Appellant's Brief on Remand. CM. NC. Dist. Lodged Amicus Curiae Brief (Multistate Tax Commission) on Remand. CM.

12/04/80—Set *due date*—Res. Reply Brief on Remand 12-26-80.

12/08/80—Filed Notice of Motion to Leave to File Brief of Amicus Curiae State of Illinois. CM. NC.

12/08/80—Filed Motion to Appear as Amicus Curiae by State of Illinois Department of Revenue, by Its Attorney, Tyrone Fahner, Attorney General of Illinois. CM. NC.

12/10/80—Filed Motion for Assoc. of Foreign Counsel of (1) William D. Dexter, General Counsel, Multi-

Date Register-of-Actions

state Tax Commission, 204 Custer Way, Olympia WA 98501, as Amicus Curiae for the Multistate Tax Commission and the States Participating With the Multistate Tax Commission in Its Amicus Brief; and (2) Tyrone Fahner, Attorney General of the State of Illinois, 160 N. La Salle St., Chicago, Illinois 60601, and Fred H. Montgomery and Frederick J. Czerwionka, as Amicus Curiae for the State of Illinois. CM. NC.

12/10/80—Entered Order Setting Case for Hearing on the Merits—and Remand at 9:00 a.m., Jan. 12, 1981 in Boise. NC.

12/22/80—Entered Order Granting Motion Filed 11-14-80 re Motion to File Amicus Curiae Brief by Multistate Tax Commission. NC.

12/23/80—Entered Order Granting Motion Filed 12-10-80 re Motion to Associate Foreign Counsel. (Dexter & Fahner to Appear as Amicus Curiae). NC.

12/23/80—Entered Order Granting Motion Filed 12-8-80 re Motion for Leave to File Brief of Amicus Curiae by the State of Illinois. NC.

12/29/80—Entered Order Vacating Order Setting Case for Hearing on the Merits & Remand at 9:00 a.m., Jan. 12, 1981 & Resetting Case for Hearing at 10:30 a.m., Jan. 12, 1981 NC.

12/30/80—Filed Respondent's Reply Brief on Remand. CM. NC. Dist.

12/23/80—Filed Amicus Curiae (Multistate Tax) Brief. CM. NC. Dist.

12/23/80—Filed Amicus Curiae (State of Illinois) Brief. CM. NC. Dist.

Date Register-of-Actions

01/12/81—The App. Moved for Admission of George Beatty (D.C.) for the Purpose of Making Oral Argument. No Objection. So Ordered. The Respondent Moved for Admission of William D. Dexter (Washington) for the Purpose of Making Oral Argument. No Objection. So Ordered. The Cause Was Argued on Remand from the U.S. Supreme Court by George Beatty, Wash. D.C. and Philip E. Peterson for Appellant and by Theodore V. Spangler, Dep. Atty. Gen. and William D. Dexter, Tumwater, WA. for Respondent.

01/12/81—Entered Order—This Case Being Fully Argued, a Written Opinion Will Issue in Due Time.

02/02/81—Received Letter from Counsel for App. with Attached Recent Decision of the New Mexico Supreme Court. CM. NC. Dist.

03/04/81—Filed Case Opinion. NC, J & C.

03/04/81—Appeal Description ** on Remand from the U. S. Supreme Court. Prior Opinion & Order of This Court Are *Reinstated*

03/26/81—Filed Remittitur. NC, J, C & J. Callister.

03/26/81—Released to West Publishing.

05/18/81—Filed Notice of Appeal to the Supreme Court of the United States by American Smelting. CM. NC. Dist.

10/09/81—Filed Order from U. S. Supreme Court, Dated 10-5-81, That in This Case Probable Judrisdiction Is Noted. The Case Is Set for Oral Argument in Tandem with Case No. 80-1745, *F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico*. NC. Dist.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 53182

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,
Defendant.

COMPLAINT

[filed July 25, 1974]

COMES Now the plaintiff, American Smelting and Refining Company, and for claim for relief against the defendant, alleges as follows:

1. The plaintiff, American Smelting and Refining Company, is a corporation duly authorized to do business in the State of Idaho.

2. Defendant, Idaho State Tax Commission, has improperly determined income tax deficiencies and interests against the plaintiff for the years and in the amounts as follows:

Year	Deficiency	Interest	Total
1968	$ 92,471.88	$28,897.46	$121,369.34
1969	136,485.00	28,101.34	139,393.78
1970	129,740.76	23,437.02	145,187.78

3. The deficiencies and interests set out in 2. above were the result of an improper apportionment to the State of Idaho of income plaintiff derived from dividends, interest, patent royalties and capital gains subject to tax by the

State of New York, the commercial domicile of the plaintiff.

4. That the improper apportionment set out above is contrary to the provision of Idaho Code Section 63-3027 and related sections, the Constitution of the State of Idaho, Article I, Section 13, the due process clause of the United States Constitution, Article IV, section 1, and the commerce clause of the United States Constitution, Article I, Section 8.

5. Plaintiff brings this action pursuant to provisions of Idaho Code Section 63-3049, permitting judicial examination of determinations by the defendant.

6. A bond in the amount of $817,259.98, double the amount of the determination by the Idaho State Tax Commission from which this appeal is taken, has been filed with this Court.

WHEREFORE plaintiff prays that the determination of the Idaho State Tax Commission be set aside and for such other and further relief as to the Court may seem just in the premises.

DATED this 25th day of July, 1974.

CLEMONS, COSHO, HUMPHREY & SAMUELSEN

/s/ R. MICHAEL SOUTHCOMBE
R. Michael Southcombe

/s/ PHILIP E. PETERSON
Philip E. Peterson
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 53182

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff,

-vs-

IDAHO STATE TAX COMMISSION,
Defendant.

ANSWER

[filed August 26, 1974]

COMES Now Defendant Idaho State Tax Commission and in response to Plaintiff's Complaint herein states and alleges as follows:

I.

Defendant denies each and every allegation, statement of fact and conclusion of law contained in Plaintiff's Complaint not specifically admitted herein.

II.

Defendant admits the allegations in Paragraph 1 of Plaintiff's Complaint.

III.

In response to Paragraph 2 of Plaintiff's Complaint, Defendant admits that Defendant determined income tax deficiencies and interest against the Plaintiff for the years and in the amounts alleged in Plaintiff's Complaint but Defendant denies that such determinations were made improperly.

IV.

In response to Paragraph 3 of Plaintiff's Complaint, Defendant admits that certain income derived by the Plaintiff from dividends, interest, patent royalties and capital gains was determined by the Defendant to be income includible in Plaintiff's total business income subject to apportionment. Defendant further admits that the State of New York is the commercial domicile of the Plaintiff. Defendant denies each and every other allegation, statement of fact and conclusion of law contained in Paragraph 3 of Plaintiff's Complaint.

V.

Defendant denies each and every allegation, statement of fact and conclusion of law contained in Paragraph 4 of Plaintiff's Complaint.

VI.

Defendant admits the allegations of Paragraphs 5 and 6 of Plaintiff's Complaint.

WHEREFORE, Defendant prays that Plaintiff's Complaint be dismissed and held for nought.

DATED this 23 day of August, 1974.

ATTORNEY FOR DEFENDANT
/S/ THEODORE V. SPANGLER, JR.
Theodore V. Spangler, Jr.
Assistant Attorney General

I hereby certify that I have on this 23rd day of August, 1974, served a copy of the within and foregoing ANSWER by sending the same by United States mail, postage prepaid, in an envelope addressed to R. Michael Southcombe, Attorney of the firm Clemons, Cosho, Humphrey & Samuelsen, 1110 Bank of Idaho Bldg., Boise, Id. 83702 and to Philip E. Peterson, Attorney at Law, 318 5th St., Lewiston, Id. 83501.

/s/ THEODORE V. SPANGLER, JR.
Theodore V. Spangler, Jr.
Assistant Attorney General

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 53182

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,
Defendant.

PRE-TRIAL ORDER

[filed January 30, 1975]

The parties to this action, by and through their respective counsel, Phillip E. Peterson and R. Michael Southcombe, attorneys for plaintiff, and Theodore E. Spangler, attorney for defendant, met with the Court on the 29th day of January, 1975, for the purpose of complying with Rule 16, I.R.C.P. and for the preparation of this Order.

The parties, prior to the pre-trial conference, agreed as to a proposed order and subsequent to the conference, the Court, having no substantial alterations, entered the proposed Order as the Pre-Trial Order.

1. The parties have produced for examination by each other all exhibits contemplated to be necessary for trial and required to be produced at a pre-trial conference and such exhibits are attached to this Order as Exhibits 1 and 2 of the stipulation which is incorporated herein an Annex 1 to the Pre-Trial Order.

2. It is apparent from the record and discussions with counsel that good faith settlement discussions were unsuccessful and the contentions of the parties are such that there is no possibility of any settlement.

3. There are no requests for further discovery.

4. There is no continuing discovery requiring supplemental answers.

5. This is a non-jury trial, estimated for three days, to commence on the 5th day of February, 1975.

6. The plaintiff is contesting the determination by the defendant of income tax deficiencies and interest against plaintiff for the tax years 1968, 1969 and 1970.

7. The taxpayer is involved in mining, smelting and refining non-ferrous metals in various states. It has interests in several corporations, most of which are engaged in mining operations either in the United States or in foreign countries. The taxpayer's stock interest in these corporations ranges from ownership of an infinitesimal interest to 100% ownership. In 1967, taxpayer was forced by the State Tax Commission to abandon its method of reporting income to Idaho by separate accounting and to utilize the apportionment method. For the years involved, 1968, 1969 and 1970 six corporations, the entire stock of which was owned by the taxpayer, have been unitized (the income and expenses consolidated) with the taxpayer by the State Tax Commission. In addition to this, all income in the form of dividends from all other corporations in which taxpayer owns an interest, and all interest, capital gains and royalties have been treated as "business income" and apportioned by the State Tax Commission.

Multi-state corporations have income from many states. The laws of the State of Idaho provide that a certain part of that income is to be apportioned to Idaho for tax purposes. That certain part is defined in the statute as "business income." Apportionment of that "business income" is accomplished by application of a three-factor formula, which consists of sales, property and payroll. The statute provides that the sales of the corporation in Idaho is to be the numerator of a fraction of which the denominator is the sales of the corporation everywhere. Similarly, the prop-

erty and payroll of the corporation in Idaho are to be numerators of fractions of which the property and payroll of the corporation everywhere are denominators, respectively. The average of these three fractions is multiplied by the total "business income" of the corporation to determine the portion of the income of the corporation taxable by Idaho.

In this particular case, six corporations which are 100% owned by the taxpayer have been unitized by the State Tax Commission, that is, essentially consolidated with the taxpayer. The payroll, property and sales of these corporations are included in the denominators; the payroll, property and sales of all other corporations in which taxpayer has an interest are excluded from the denominator.

"Business income" includes "income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitutes integral or necessary parts of the taxpayer's trade or business operations." Gains or losses and dividend and interest income from stock or securities of any foreign or domestic corporation are presumed to be "income from intangible property, the acquisition, management, or disposition of which constitute an integral part of the taxpayer's trade or business." This presumption must be overcome by clear and convincing evidence. Plaintiff contends that in this case the dividend, interest, capital gains, and royalty income are not business income; defendant contends that they are.

Non-business income is not divided. It is allocated, that is, taxed by the single jurisdiction which is the source of the income. Income from intangibles is allocated to and subject to tax in the state of commercial domicile.

8. The claim of the parties are as follows:

A. Plaintiff:

(1) The statutory presumption that capital gains, dividend and interest income is "an integral

part of taxpayer's trade or business" will be overcome by clear and convincing evidence.

(2) "Business Income" as used in the statute is "operating income" and does not include income received by taxpayer in the form of dividends, interest, capital gains and royalties.

(3) Due Process and fair treatment of interstate commerce require that a state show a reasonable connection between the business activity sought to be taxed and the tax imposed. The state has the burden of proof on this issue and cannot establish the connection between business activity and taxpayer income sought to be taxed by the State in this case.

(4) The income of the taxpayer from Idaho operations can be and is determined in the normal course of business with reasonable certainty.

(5) It was improper to unitize the six corporations with ASARCO.

(6) Idaho is not the domicile or commercial domicile of taxpayer and lacks the power to tax income derived from sources outside the United States by the taxpayer.

(7) It is a denial of due process and an unfair burden on interstate commerce to apportion income produced by corporations in which taxpayer has an interest without allowing inclusion of the property, payroll and sales of these corporations in the denominator of the apportionment formula.

B. Defendant:

(1) Income from capital gains, dividends and interest is "business income" arising from the ac-

quisition, management or disposition of tangible and intangible property constituting an integral and necessary part of the taxpayer's trade or business, unless demonstrated to the contrary by clear and convincing evidence. The facts cannot sustain that burden of proof.

(2) The three factor apportionment formula provided in Idaho Code § 63-3027 apportions to the state of Idaho an amount of taxable income which is reasonably related to the extent of the taxpayer's activities in Idaho.

(3) In order to escape formulary apportionment the taxpayer has the burden of establishing by clear and cogent evidence that the result of the formula is so arbitrarily disproportionate to the extent of the taxpayer's activities within the state as to be an unconstitutional burden upon interstate commerce.

(4) The six subsidiary corporations combined by the State Tax Commission are part of a unitary business enterprise.

(5) Dividend income received from non-unitized subsidiaries and other corporations is not assessed against the corporation that paid the dividends or against the property of such corporations and therefore the inclusion of property, payroll and sales of the dividend paying corporation in the apportionment factor is not required.

9. The parties have stipulated to certain facts as set out in Annex 1 to this Order.

10. A. No issue of law has been abandoned by either party.

B. The complaint is amended in paragraph 4 thereof by inserting Amendment 14, Section 1 of the United States Constitution in lieu of Article IV, Section 1.

11. The issues of fact unresolved are:

A. What is the extent of taxpayer's Idaho business activity?

B. Can the corporations involved act and operate independently of ASARCO?

C. Do the corporations involved act and operate independently of ASARCO?

D. Is the sales factor in the apportionment formula properly computed?

E. Are dividends, capital gains, interest and royalties in this case integral or necessary parts of the taxpayer's trade or business operation?

F. If these items are "integral or necessary parts of the taxpayer's trade or business operation", is there a sufficient connection between taxpayer's Idaho activity and operations by other corporations in which taxpayer has an interest and from which it receives income in the form of dividends?

12. The issues of law unresolved are:

A. Are all or any of the six corporations properly unitized with the taxpayer?

B. Are:

(1) the dividends from:
(a) Federated Metals of Canada
(b) ASARCO Mercantile Company
(c) Enthone, Inc.
(d) Int'l. Metal Co.
(e) Lone Star Lead Const. Corp.

(f) No. Peru Mining Corp.
(g) ASARCO Australia
(h) [ASARCO] Developments
(i) ASARCO Exploration Company
(j) Compania American Smelting, S.A.
(k) Lake Asbestos of Quebec
(l) ASARCO Int'l. Corp.
(m) So. Peru Copper Corp.
(n) So. Peru Copper Sales Corp.
(o) M.I.M. Holdings, Ltd.
(p) Neptune Gold Mining Company
(q) ASARCO Mexicana, S.A.
(r) General Cable
(s) Revere Copper
(t) Hecla Mining Co.
(u) Kennecott Copper
(v) Phelps Dodge
(w) United Park City Mines
(x) Mexicana de Cobre, S.A.;

or

(2) capital gains from sale of General Cable stock; or

(3) capital gains, interest and royalty income "integral or necessary parts of the taxpayer's trade or business operations" in this case?

C. If the items as a whole or separately are an integral part of taxpayer's trade or business operations, is there a sufficient connection between the income earned in the form of:

(1) the dividends from:

(a) Federated Metals of Canada
(b) ASARCO Mercantile Company
(c) Enthone, Inc.
(d) Int'l. Metal Co.

(e) Lone Star Lead Const. Corp.
(f) No. Peru Mining Corp.
(g) ASARCO Australia
(h) [ASARCO] Developments
(i) ASARCO Exploration Company
(j) Compania American Smelting, S.A.
(k) Lake Asbestos of Quebec
(l) ASARCO Int'l. Corp.
(m) So. Peru Copper Corp.
(n) So. Peru Copper Sales Corp.
(o) M.I.M. Holdings, Ltd.
(p) Neptune Gold Mining Company
(q) ASARCO Mexicana, S.A.
(r) General Cable
(s) Revere Copper
(t) Hecla Mining Co.
(u) Kennecott Copper
(v) Phelps Dodge
(w) United Park City Mines
(x) Mexicana de Cobre, S.A.;

or

(2) the capital gain realized from the sale of General Cable stock; or

(3) the capital gain, interest and royalty income of the taxpayer

and the business activity of the taxpayer in the state of Idaho?

D. In order to subject dividend income to formulary apportionment, must a specific connection be shown to exist between the State of Idaho and the dividend paying corporation?

E. If the Court concludes in the affirmative on B. and C. or in the affirmative on B. and the negative on D., can the state properly use foreign source income to compute the tax liability of the taxpayer?

F. If the Court concludes that the state can properly use foreign source income to compute the tax liability of the taxpayer, can the state properly use the dividend income from the various corporations which are not unitized without increasing the size of the denominators in the three factors to properly reflect the property, payroll and sales of the various corporations in which taxpayer has an interest in computing the tax liability of the taxpayer?

13. There are no supplemental orders which will expedite the trial.

14. The exhibits admitted without objection and the only ones contemplated as necessary by the parties at this time are set out in Exhibits 1 and 2 of Annex 1 and Annex 1 itself.

15. Because of the unique nature of this action and notwithstanding paragraph 13 hereof, other exhibits may be introduced at trial, in the interest of justice, including those exhibits necessary for impeachment.

16. The plaintiff witnesses, if used, will be:

A. H. Q. Stringham
American Smelting & Refining Co.

B. John Pecca
American Smelting & Refining Co.
120 Broadway
New York, N. Y. 10005

C. Larry Alder
Idaho State Tax Commission
5257 Fairview
Boise, Idaho 83704

17. The defendant witnesses, if used, will be:

A. Arthur Schwartz
California State Franchise Tax Board

B. Frank Medlin
Idaho State Tax Commission

18. All discovery has been completed.

19. The trial dates are February 5, 6 and 7, 1975.

/s/ MARION J. CALLISTER
Marion J. Callister
District Judge

ACCEPTED WITHOUT OBJECTION

/s/ THEODORE V. SPANGLER
Theodore V. Spangler
Attorney for Defendant

/s/ PHILIP E. PETERSON
Philip E. Peterson

/s/ R. MICHAEL SOUTHCOMBE
R. Michael Southcombe
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 53182

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,
Defendant.

STIPULATION

[filed January 30, 1975]

1. With the exception of the adjustment to the revenue (sales) factor, the facts reflected in the MTC audit report are correct and the MTC Report will be admitted into evidence. The audit report is attached as Exhibit No. 1.

2. State tax returns for 1969 and 1970 will be admitted as evidence.

3. The 1968 State tax return will be admitted. The parties state that the 1968 return as submitted was prepared by use of separate accounting and that adjustments reflecting the result of a compromise agreement executed in 1970 (by which the taxpayer acceded to objection by the state to its use of separate accounting and agreed to apportion income other than that resulting from dividends, interest, royalties, and capital gains) were made by the state without submission of an amended return and the tax based upon these adjustments paid by taxpayer.

A copy of the compromise agreement is attached and marked Exhibit No. 2.

4. The volume of sales by ASARCO to the other corporations whose dividends are apportioned by the State Tax Commission as business income or which are unitized and the volume of sales to other customers in dollars and as a percentage of total ASARCO sales in each of the years involved is:

CHART A

Customer		1968 $ amt. of sales	1968 % of total sales	1969 $ amt. of sales	1969 % of total sales	1970 $ amt. of sales	1970 % of total sales
Federated Metals of Canada	)	776,844	0.13	939,197	0.13	1,053,588	0.16
ASARCO Mercantile Company	)	none		none		none	
Enthone, Inc.	) UNITIZED	$ 262,382	0.04	$ 552,387	0.07	$ 447,907	0.07
Int'l. Metal Co.	)	none*		none*		none*	
Lone Star Lead Const. Corp.	)	65,732		71,201		258,602	0.04
No. Peru Mining Corp.	)	none		none		none	
ASARCO Australia		none		none		none	
ASARCO Developments		none		none		none	
ASARCO Exploration Company		none		none		none	
Compania American Smelting, S.A.		none		none		none	
Lake Asbestos of Quebec		none		none		none	
ASARCO Int'l. Corp.		none		none		none	
So. Peru Copper Corp.		none		none		none	
So. Peru Copper Sales Corp.		none		none		none	
M.I.M. Holdings, Ltd.		none		none		none	
Neptune Gold Mining Company		none		none		none	
ASARCO Mexicana, S.A.		none		24,169		14,902	
General Cable		31,558,000	5.3	45,952,000	6.3	47,000,000	7.0
Revere Copper		17,223,000	2.9	29,324,000	4.0	22,260,000	3.3
Hecla Mining Co.		none		none		none	
Kennecott Copper		3,259,918	0.55	5,614,329	0.77	5,227,649	0.79
Phelps Dodge		176,552	0.03	23,786	0.003	806,828	0.12
United Park City Mines		minimal		minimal		minimal	
All others **		536,910,402	91.0	644,367,070	89.0	594,211,356	89.0
TOTALS		$590,232,830		$726,868,139		$671,280,832	

* International Metal Company is foreign sales agent for American Smelting and Refining Company;

** This includes sales to all other customers, including some in which ASARCO may own common stock but in which ownership is miniscule and therefore disregarded.

5. The percentage of ownership by ASARCO in the companies whose dividends are apportioned by the State Tax Commission as business income or which are unitized is as follows: *

CHART B

Corporation		% Ownership by ASARCO		
		1968	1969	1970
Federated Metals of Canada	)	100	100	100
ASARCO Mercantile Company	)	100	100	100
Enthone, Inc.	) UNITIZED	100	100	100
Int'l. Metal Co.	)	100	100	100
Lone Star Lead Const. Corp.	)	100	100	100
No. Peru Mining Corp.	)	100	100	100
ASARCO Australia		100	100	100
ASARCO Developments		100	100	100
ASARCO Exploration Company		100	100	100
Compania American Smelting, S.A.		100	100	100
Lake Asbestos of Quebec		100	100	100
ASARCO Int'l. Corp.		100	100	100
So. Peru Copper Corp.		51.5	51.5	51.5
So. Peru Copper Sales Corp.		51.5	51.5	51.5
M.I.M. Holdings Ltd. (Mt. Isa)		53.0	52.7	52.7
Neptune Gold Mining Co.		51.8	51.8	51.8
ASARCO Mexicana, S.A.		49	49	49
Mexicana de Cobre, S.A.		49	49	49
General Cable		35.9	35.9	0
Revere Copper		33.6	33.5	33.4
Hecla Mining Co.		1.3	1.1	.9
Kennecott Copper		.4	.3	.3
Phelps Dodge		.8	.8	.8
United Park City Mines		12.7	12.5	12.5

* Other dividends are apportioned by the State Tax Commission but are not included because of the miniscule interest of ASARCO in these companies.

6. (a) The directors of the corporations whose dividends are apportioned as business income by the State Tax Commission or which are unitized are listed below. The names of those directors who were also directors of ASARCO are [underscored] *italicized*:

FEDERATED METALS OF CANADA (UNITIZED)

1968	1969	1970
R. D. Bradford	*F. G. Hamrick*	*F. G. Hamrick*
F. G. Hamrick	*E. McL. Tittmann*	*E. McL. Tittmann*
E. McL. Tittmann	*C. F. Barber*	*C. F. Barber*
R. W. Vaughan	G. F. Norman	*R. L. Hennebach*
A. M. Callis	R. L. Hennebach	G. F. Norman
H. L. Goodenough	R. A. Kenkel	R. A. Kenkel
M. R. Herman	K. Smalberg	K. Smalberg
G. F. Norman	H. Q. Stringham	H. Q. Stringham

ASARCO MERCANTILE COMPANY (UNITIZED)

1968	1969	1970
F. G. Hamrick	*F. G. Hamrick*	*F. G. Hamrick*
H. L. Goodenough	H. L. Goodenough	A. J. Gillespie, Jr.
J. P. Harrison	J. P. Harrison	J. P. Harrison

ENTHONE, INC. (UNITIZED)

1968	1969	1970
C. F. Barber	*C. F. Barber*	*C. F. Barber*
R. D. Bradford	*F. G. Hamrick*	*F. G. Hamrick*
F. G. Hamrick	*E. McL. Tittmann*	*E. McL. Tittmann*
E. McL. Tittmann	R. D. Bradford	*R. L. Hennebach*
A. M. Callis	A. M. Callis	C. C. Helmle
C. C. Helmle	C. C. Helmle	R. A. Kenkel
M. R. Herman	R. A. Kenkel	K. Smalberg

INTERNATIONAL METAL CO. (UNITIZED)

1968	1969	1970
R. D. Bradford	*F. G. Hamrick*	*F. G. Hamrick*
F. G. Hamrick	*S. D. Strauss*	*S. D. Strauss*
S. D. Strauss	*E. McL. Tittmann*	*E. McL. Tittmann*
E. McL. Tittmann	R. D. Bradford	*C. F. Barber*
K. H. Brownell	J. C. Buck	J. C. Buck
J. C. Buck	R. L. Wilcox	R. L. Wilcox

LONE STAR LEAD CONSTRUCTION CORPORATED (UNITIZED)

1968	1969	1970
R. D. Bradford	*E. McL. Tittmann*	*E. McL. Tittmann*
E. McL. Tittmann	R. D. Bradford	R. L. Hennebach
A. M. Callis	A. M. Callis	R. A. Kenkel

NORTHERN PERU MINING CORPORATION (UNITIZED)

1968	1969	1970
C. F. Barber	*C. F. Barber*	*C. F. Barber*
R. D. Bradford	*F. G. Hamrick*	*R. L. Hennebach*
F. G. Hamrick	*C. E. Nelson*	*F. G. Hamrick*
C. E. Nelson	*E. McL. Tittmann*	*S. D. Strauss*
E. McL. Tittmann	R. D. Bradford	*C. E. Nelson*
R. W. Vaughan	A. J. Alvarez Calderon	*E. McL. Tittmann*
A. J. Alvarez Calderon	H. L. Goodenough	J. G. Cox
H. L. Goodenough	A. L. Hatch	A. J. Alvarez Calderon
A. L. Hatch	C. P. Pollock	C. P. Pollock
C. P. Pollock	R. W. Vaughan	H. Q. Stringham
A. B. Williams	A. B. Williams	A. B. Williams

ASARCO AUSTRALIA

R. W. Vaughan	*R. W. Vaughan*	
C. P. Pollock	C. P. Pollock	C. P. Pollock
J. J. Collins	J. J. Collins	J. J. Collins
W. P. Rowland	W. P. Rowland	W. P. Rowland
David Fletcher	David Fletcher	David Fletcher

ASARCO DEVELOPMENTS (NZ), LTD.

THERE WERE NO COMMON DIRECTORS BETWEEN ASARCO DEVELOPMENTS (NZ), LTD. AND ASARCO FOR ANY OF THE THREE YEARS IN QUESTION.

ASARCO EXPLORATION COMPANY

1968	1969	1970
C. F. Barber	*C. F. Barber*	*C. F. Barber*
R. D. Bradford	*C. E. Nelson*	*C. E. Nelson*
C. E. Nelson	*E. McL. Tittmann*	*R. L. Hennebach*
E. McL. Tittmann	R. D. Bradford	*E. McL. Tittmann*
G. E. Hill	G. E. Hill	S. A. Amzalone
T. C. Osborne	T. C. Osborne	G. E. Hill
C. P. Pollock	C. P. Pollock	C. P. Pollock

COMPANIA AMERICAN SMELTING, S.A.

1968	1969	1970
Jaime Yrarrazaval	Jaime Yrarrazaval	Jaime Yrarrazaval
W. T. Brown	W. T. Brown	W. T. Brown
A. G. Dell	A. G. Dell	A. G. Dell
Augusto Cerda	Augusto Cerda	Augusto Cerda
Mariano Puga	Mariano Puga	Juan de Dios Vial

LAKE ASBESTOS OF QUEBEC, LTD.

1968	1969	1970
C. F. Barber	*C. F. Barber*	*C. F. Barber*
R. D. Bradford	*S. D. Strauss*	*S. D. Strauss*
S. D. Strauss	*E. McL. Tittmann*	*E. McL. Tittmann*
E. McL. Tittmann	*F. G. Hamrick*	*F. G. Hamrick*
R. W. Vaughan	*R. L. Hennebach*	*R. L. Hennebach*
M. J. Messel	M. J. Messel	M. J. Messel
C. P. Pollock	C. P. Pollock	C. P. Pollock

ASARCO INTERNATIONAL CORPORATION

1968	1969	1970
C. F. Barber	*C. F. Barber*	*C. F. Barber*
F. G. Hamrick	*F. G. Hamrick*	*F. G. Hamrick*
R. W. Vaughan	H. L. Goodenough	M. J. Messel
H. L. Goodenough	M. J. Messel	R. Richter
M. J. Messel	R. Richter	J. C. Buck
R. Richter	J. S. Smart, Jr.	A. J. Gillespie, Jr.
J. S. Smart, Jr.	R. W. Vaughan	H. Q. Stringham

SOUTHERN PERU COPPER CORPORATION

1968	1969	1970
F. G. Hamrick	*C. F. Barber*	*C. F. Barber*
C. E. Nelson	*F. G. Hamrick*	*F. G. Hamrick*
E. McL. Tittmann	*C. E. Nelson*	*C. E. Nelson*
R. W. Vaughan	*E. McL. Tittmann*	*E. McL. Tittmann*
F. W. Archibald	*F. W. Archibald*	*F. W. Archibald*
R. C. Bonebrake	R. C. Bonebrake	R. C. Bonebrake
W. E. Fenzi	W. E. Fenzi	W. E. Fenzi
A. Hohagen	A. Hohagen	A. Hohagen
R. P. Koenig	R. P. Koenig	R. P. Koenig
P. Malozemoff	P. Malozemoff	P. Malozemoff
R. G. Page	R. G. Page	R. G. Page
H. D. Starr	H. D. Starr	H. D. Starr
S. P. Wimpfen	S. P. Wimpfen	

SOUTHERN PERU COPPER SALES CORPORATION

1968	1969	1970
C. F. Barber	*C. F. Barber*	*C. F. Barber*
F. G. Hamrick	*F. G. Hamrick*	*F. G. Hamrick*
R. L. Hennebach	*R. L. Hennebach*	*R. L. Hennebach*
S. D. Strauss	*S. D. Strauss*	*S. D. Strauss*
R. W. Vaughan	A. L. Hatch	A. J. Gillespie, Jr.
H. L. Goodenough	A. J. Gillespie, Jr.	H. Q. Stringham
A. L. Hatch	H. Q. Stringham	J. G. Cox

M.I.M. HOLDINGS, LTD. (MT. ISA)

THERE WERE NO COMMON DIRECTORS BETWWEN M.I.M. HOLDINGS, LTD. AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

NEPTUNE GOLD MINING CO.

1968	1969	1970
C. F. Barber	*C. F. Barber*	*C. F. Barber*
F. G. Hamrick	*F. G. Hamrick*	*F. G. Hamrick*
C. E. Nelson	*C. E. Nelson*	*C. E. Nelson*
E. H. Scheick	E. H. Scheick	E. H. Scheick
H. S. Anderson	H. S. Anderson	H. S. Anderson
R. M. Reininger	R. M. Reininger	R. M. Reininger

ASARCO MEXICANA, S.A.

1968	1969	1970
J. F. Fernandez	J. Larrea	J. Larrea
D. Longoria	B. Pagliai	B. Pagliai
E. Escandon	A. R. Galindo, Jr.	A. R. Galindo, Jr.
R. O'Farrill, Jr.	C. Sada	C. Sada
I.G.P. Serrano	J. Cortina	J. F. Fernandez
G. Q. Bravo	J. S. Piedecasas	J. Larrea, Jr.
I.J.C. Martinez	J. Larrea, Jr.	E. Rojas
	E. Rojas	

SERIES "B" STOCK

1968	1969	1970
C. F. Barber	*C. F. Barber*	*C. F. Barber*
F. G. Hamrick	*F. G. Hamrick*	*F. G. Hamrick*
H. L. Hennebach	*R. L. Hennebach*	*R. L. Hennebach*
R. D. Bradford	*C. E. Nelson*	*S. D. Strauss*
C. E. Nelson	*S. D. Strauss*	*F. W. Archibald*
S. D. Strauss	H. L. Montague	K. D. Loughridge
R. W. Vaughan	C. P. Pollock	T. A. Snedden

MEXICANA DE COBRA, S.A.
NOT AVAILABLE

GENERAL CABLE

THERE WERE NO COMMON DIRECTORS BETWEEN GENERAL CABLE AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

REVERE COPPER

THERE WERE NO COMMON DIRECTORS BETWEEN [ASARCO] AND REVERE COPPER IN ANY OF THE THREE YEARS IN QUESTION.

HECLA MINING CO.

THERE WERE NO COMMON DIRECTORS BETWEEN ASARCO AND HELCA MINING CO. IN ANY OF THE THREE YEARS IN QUESTION.

KENNECOTT COPPER

THERE WERE NO COMMON DIRECTORS BETWEEN ASARCO AND KENNECOTT COPPER IN ANY OF THE THREE YEARS IN QUESTION.

PHELPS DODGE

THERE WERE NO COMMON DIRECTORS BETWEEN ASARCO AND PHELPS DODGE IN ANY OF THE THREE YEARS IN QUESTION.

UNITED PARK CITY MINES

THERE WERE NO COMMON DIRECTORS BETWEEN ASARCO AND UNITED PARK CITY MINES IN ANY OF THE THREE YEARS IN QUESTION.

(b) The officers of the corporations whose dividends are apportioned as busines income by the State Tax Commission or which are unitized are listed below with their titles indicated. The names of those who are also officers of ASARCO are [underscored] *italicized* with their titles at ASARCO indicated.

FEDERATED METALS OF CANADA (UNITIZED)

1968			1969			1970		
NAME	TITLE	ASARCO	NAME	TITLE	ASARCO	NAME	TITLE	ASARCO
A. M. Callis	Vice Pres.	Vice Pres.	*F. G. Hamrick*	Vice Pres.	Vice Pres.	*F. G. Hamrick*	Vice Pres.	Vice Pres.
R. W. Vaughan	Vice Pres.	Vice Pres.	*A. J. Gillespie, Jr.*	Secty.	Secty.	*A. J. Gillespie, Jr.*	Secty.	Secty.
F. G. Hamrick	Treas.	V.P., Treas.	*R. A. Kenkel*	Vice Pres.	Vice Pres.	*R. A. Kenkel*	Vice Pres.	Vice Pres.
H. L. Goodenough	Comptroller	Comptroller	*R. J. Plumb, Jr.*	Treas.	Treas.	*R. J. Plumb, Jr.*	Treas.	Treas.
H. Howe	Secty.	Secty.	*H. Q. Stringham*	Comp.	Comp.	*H. Q. Stringham*	Comp.	Comp.
G. F. Norman	Pres.		G. F. Norman	Pres.		G. F. Norman	Pres.	
H. D. Tribey	Vice Pres.							

ASARCO MERCANTILE COMPANY (UNITIZED)

J. P. Harrison	Pres.	Vice Pres.	*J. P. Harrison*	Pres.	Vice Pres.	*J. P. Harrison*	Pres.	Vice Pres.
F. G. Hamrick	Treas.	V.P., Treas.	*F. G. Hamrick*	Treas.	Vice Pres.	*A. J. Gillespie, Jr.*	Secty.	Secty.
H. L. Goodenough	Comp.	Comp.	*A. J. Gillespie, Jr.*	Secty.	Secty.	*R. J. Plumb, Jr.*	Treas.	Treas.
Harold Howe	Secty.	Secty.	*H. L. Goodenough*	Comp.	Comp.	*H. Q. Stringham*	Comp.	Comp.
J. Z. Williams	Vice Pres.		G. Rafos	Vice Pres.		G. Rafos	Vice Pres.	

ENTHONE, INC. (UNITIZED)

A. M. Callis	Vice Pres.	Vice Pres.	*R. A. Kenkel.*	Vice Pres.	Vice Pres.	*F. G. Hamrick*	Vice Pres.	V.P.
F. G. Hamrick	Treas.	V.P., Treas.	F. *G. Hamrick*	Treas.	Vice Pres.	*R. A. Kenkel*	Vice Pres.	V.P.
H. L. Goodenough	Comp.	Comp.	*A. M. Callis*	Vice Pres.	Vice Pres.	*R. J. Plumb, Jr.*	Treas.	Treas.
Harold Howe	Secty.	Secty.	*H. L. Goodenough*	Comp.	Comp.	*H. Q. Stringham*	Comp.	Comp.
C. C. Helmle	Pres.		C. C. Helmle	Pres.		C. C. Helmle	Pres.	
M. R. Herman	Vice Pres.							

INTERNATIONAL METAL CO. (UNITIZED)

1968			1969			1970		
NAME	TITLE	ASARCO	NAME	TITLE	ASARCO	NAME	TITLE	ASARCO
S. D. Strauss	Pres.	Vice Pres.	*S. D. Strauss*	Pres.	Vice Pres.	*S. D. Strauss*	Pres.	Vice Pres.
F. G. Hamrick	Treas.	V.P., Treas.	*F. G. Hamrick*	Treas.	Vice Pres.	*A. J. Gillespie, Jr.*	Secty.	Secty.
H. L. Goodenough	Comp.	Comp.	*A. J. Gillespie, Jr.*	Secty.	Secty.	*R. J. Plumb, Jr.*	Treas.	Treas.
H. Howe	Secty.	Secty.	*H. L. Goodenough*	Comp.	Comp.	*H. Q. Stringham*	Comp.	Comp.
K. H. Brownell	Vice Pres.		J. C. Buck	Vice Pres.		J. C. Buck	Vice Pres.	
J. C. Buck	Vice Pres.		R. L. Wilcox	Vice Pres.		R. L. Wilcox	Vice Pres.	

LONE STAR LEAD CONSTRUCTION CORP. (UNITIZED)

A. M. Callis	Pres.	V.P.	*F. G. Hamrick*	Treas.	V.P.	*A.J. Gillespie, Jr.*	Secty.	Secty.
F. G. Hamrick	Treas.	V.P., Treas.	*A. J. Gillespie, Jr.*	Secty.	Secty.	*R. A. Kenkel*	Pres.	V.P.
H. L. Goodenough	Comp.	Comp.	*A. M. Callis*	Pres.	V.P.	*R. J. Plumb, Jr.*	Treas.	Treas.
H. Howe	Secty.	Secty.	*H. L. Goodenough*	Comp.	Comp.	*H. Q. Stringham*	Comp.	Comp.
E. J. Baker	V.P.		E. J. Baker	V. P.		E. J. Baker	V. P.	

NORTHERN PERU MINING CORPORATION (UNITIZED)

C. E. Nelson	Pres.	V.P.	*C. E. Nelson*	Pres.	V.P.	*C. E. Nelson*	Pres.	V.P.
R. W. Vaughan	V.P.	V.P.	*F. G. Hamrick*	Treas.	V.P.	*F. G. Hamrick*	V.P.	V.P.
F. G. Hamrick	Treas.	V.P., Treas.	*A. J. Gillespie, Jr.*	Secty.	Secty.	*A. J. Gillespie, Jr.*	Secty.	Secty.
H. L. Goodenough	Comp.	Comp.	*H. L. Goodenough*	Comp.	Comp.	*R. J. Plumb, Jr.*	Treas.	Treas.
H. Howe	Secty.	Secty.	R. W. Vaughan	V.P.		*H. Q. Stringham*	Comp.	Comp.
A. B. Williams	V.P.		A. B. Williams	V.P.		A. B. Williams	V.P.	

1968			1969			1970		
NAME	TITLE	ASARCO	NAME	TITLE	ASARCO	NAME	TITLE	ASARCO
H. Howe	Secty.	Secty.	H. Howe	Secty.	Secty.	*A. J. Gillespie, Jr.	Secty.	Secty.

ASARCO DEVELOPMENTS (N.Z.) LTD.

THERE WERE NO COMMON OFFICERS BETWEEN ASARCO DEVELOPMENTS (N.Z.) LTD. AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

ASARCO EXPLORATION CO. OF CANADA LTD.

C. P. Pollock	Pres.	V.P.	*C. P. Pollock*	Pres.	V.P.	*C. P. Pollock*	Pres.	V.P.
C. E. Nelson	V.P.	V.P.	*C. E. Nelson*	V.P.	V.P.	*C. E. Nelson*	V.P.	V.P.
F. G. Hamrick	Treas.	V.P., Treas.	*F. G. Hamrick*	Treas.	V.P.	*R. J. Plumb, Jr.*	Treas.	Treas.
H. L. Goodenough	Comp.	Comp.	*H. L. Goodenough*	Comp.	Comp.	*H. Q. Stringham*	Comp.	Comp.
H. Howe	Secty.	Secty.	*A. J. Gillespie, Jr.*	Secty.	Secty.	*A. J. Gillespie, Jr.*	Secty.	Secty.

COMPANIA AMERICAN SMELTING, S.A.

NOT PRESENTLY AVAILABLE

LAKE ASBESTOS OF QUEBEC

C. P. Pollock	V.P.	V.P.	*C. P. Pollock*	V.P.	V.P.	*C. P. Pollock*	V.P.	V.P.
F. G. Hamrick	Treas.	V.P., Treas.	*A. J. Gillespie, Jr.*	Secty.	Secty.	*A.J. Gillespie, Jr.*	Secty.	Secty.
H. L. Goodenough	Comp.	Comp.	*R.J. Plumb, Jr.*	Treas.	Treas.	*R. J. Plumb, Jr.*	Treas.	Treas.
H. Howe	Secty.	Secty.	*H. Q. Stringham*	Comp.	Comp.	*H. Q. Stringham*	Comp.	Comp.
M. J. Messel	Pres.		M. J. Messel	Pres.		M. J. Messel	Pres.	
L. C. Piuze	V.P.		L. C. Piuze	V.P.		L. C. Piuze	V.P.	

1968			1969			1970		
NAME	TITLE	ASARCO	NAME	TITLE	ASARCO	NAME	TITLE	ASARCO
H. Howe	Secty.	Secty.	*H. Q. Stringham*	Treas.	Comp.	*H. Q. Stringham*	Treas.	Comp.
M. J. Messel	Pres.		*A.J. Gillespie, Jr.*	Secty.	Secty.	*A. J. Gillespie, Jr.*	Secty.	Secty.
J. S. Smart, Jr.	V.P.		M. J. Messel	Pres.		M. J. Messel	Pres.	
R. P. Gagnon	V.P.		J. S. Smart, Jr.	V. P.		R. P. Gagnon	V.P.	
H. Shapiro	Comp.		R. P. Gagnon	V.P.		J. C. Buck	V.P.	
H. Q. Stringham	Treas.							
SOUTHERN PERU COPPER CORPORATION								
R. W. Vaughan	V.P.	V.P.	*R. L. Hennebach*	V.P.	Exec. V.P.	*R. L. Hennebach*	V.P.	Exec. V.P.
F. G. Hamrick	Treas.	V.P., Treas.	*F. G. Hamrick*	Treas.	V.P.	*F. W. Archibald*	Pres.	V.P.
H. Howe	Secty.	Secty.	*A.J. Gillespie, Jr.*	Secty.	Secty.	*F. G. Hamrick*	Treas.	V.P.
S. P. Wimpfen	Pres.		S. P. Wimpfen	Pres.		*A.J. Gillespie, Jr.*	Secty.	Secty.
C. A. Kursell	V. P.		J. P. Cougnenc	V.P.		J. P. Cougnenc	V.P.	
J. D. Wright	Comp.		J. D. Wright	Comp.		J. B. Watson	Comp.	
SOUTHERN PERU COPPER SALES CORP.								
R. W. Vaughan	Pres.	V.P.	*A. L. Hatch*	Pres.	V.P.	*A.J. Gillespie, Jr.*	Secty.	Secty.
H. Howe	Secty.	Secty.	*A.J. Gillespie, Jr.*	Secty.	Secty.	*S. D. Strauss*	V.P.	V.P.
A. L. Hatch	V.P.		*S. D. Strauss*	V.P.	V.P.	J. G. Cox	Pres.	
D. Wright	Treas.& Comp.		D. Wright	Treas.& Comp.		B. Watson	Treas.& Comp.	

M.I.M. HOLDINGS LTD.

THERE WERE NO COMMON OFFICERS BETWEEN M.I.M. HOLDINGS LTD. AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

NEPTUNE GOLD MINING CO.

1968			1969			1970		
NAME	TITLE	ASARCO	NAME	TITLE	ASARCO	NAME	TITLE	ASARCO
C. E. Nelson	Pres.	V.P.	*C. E. Nelson*	Pres.	V.P.	*C. E. Nelson*	Pres.	V.P.
C. F. Barber	V.P.	Exec. V.P.	*C. F. Barber*	V.P.	Pres.	*C. F. Barber*	V.P.	Pres.
F. G. Hamrick	Treas.	V.P.& Treas.	*A.J. Gillespie, Jr.*	Secty.	Secty.	*A.J. Gillespie, Jr.*	Secty.	Secty.
H. L. Goodenough	Comp.	Comp.	*R.J. Plumb, Jr.*	Treas.	Treas.	*R.J. Plumb, Jr.*	Treas.	Treas.
E. H. Scheick	V.P.		*H. Q. Stringham*	Comp.	Comp.	*H. Q. Stringham*	Comp.	Comp.
H. S. Anderson	V.P.		E. H. Scheick	V.P.		E. H. Scheick	V.P.	
			H. S. Anderson	V.P.		H. S. Anderson	V.P.	

ASARCO MEXICANA, S.A.

THERE WERE NO COMMON OFFICERS BETWEEN M.I.M. HOLDINGS LTD. AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

GENERAL CABLE

THERE WERE NO COMMON OFFICERS BETWEEN GENERAL CABLE AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

REVERE COPPER CO.

THERE WERE NO COMMON OFFICERS BETWEEN REVERE COPPER CO. AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

HECLA MINING CO.

THERE WERE NO COMMON OFFICERS BETWEEN HECLA MINING CO. AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

KENNECOTT COPPER CO.

THERE WERE NO COMMON OFFICERS BETWEEN KENNECOTT COPPER CO. AND ASARCO IN ANY OF THREE YEARS IN QUESTION.

PHELPS DODGE

THERE WERE NO COMMON OFFICERS BETWEEN PHELPS DODGE AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

UNITED PARK CITY MINES

THERE WERE NO COMMON OFFICERS BETWEEN UNITED PARK CITY MINES AND ASARCO IN ANY OF THE THREE YEARS IN QUESTION.

7. The volume of sales to ASARCO and to other customers by corporations whose dividends are apportioned by the State Tax Commission as business income or which are unitized in dollars and as a percentage of total sales of each of the said corporations in each of the years involved is:

CHART C

1968

Corporations		Sales to ASARCO $ Amt. of sales	Sales to ASARCO % of total sales	Sales to Listed Corporations* corp. name	Sales to Listed Corporations* $ Amt. of sales	Sales to Listed Corporations* % of total sales	Sales to All Others $ Amt. of sales	Sales to All Others % of total sales	TOTAL SALES 100% of total sales $ Amt.
Federated Metals of Canada	)	278,639	1.7	all combined	341	–0–	15,859,177	98.3	16,138,157
ASARCO Mercantile Co.	)	1,072,276	40.2	Lake Asbestos	38,505	1.4			2,670,637
	)			No. Peru	162,630	6.1			
	)			Neptune Mines	132,104	4.9			
	)			So. Peru	1,265,122	47.4			
	) U								
	) N			Federated Metal					
Ethone, Inc.	) I	265,477	4.4	of Canada	42,972	0.7	5,719,329	94.9	6,027,778
Int'l. Metal Co.	) T	3,283,592	55.2				2,667,705	44.8	5,951,297
Lone Star Lead	) I								
Const. Corp.	) Z	226,087	31.6				488,931	68.4	715,018
	) E								
	) D								
No. Peru Mining Corp.	)	8,091,965	77.1	Int'l. Metal (incl. in sale to ASARCO)			2,407,133	22.9	10,499,098
ASARCO Australia		12,798	4.8				253,291	95.2	266,089
ASARCO Developments		2,320	1.1				211,597	98.9	213,917
ASARCO Exploration Co.		29,009	100.0						29,009
Compania American Smelting, S.A.									none
Lake Asbestos of Quebec				ASARCO Int'l. Corp.	13,317,517	81.7	2,984,008	18.3	16,301,525
ASARCO Int'l. Corp.		none					14,202,229	100.0	14,202,229
				So. Peru					
So. Peru Copper Corp.		49,824,905	35.8	copper sales	39,522,877	28.4	49,985,420	35.8	139,333,202
So. Peru Copper Sales Corp.							39,272,410	100.0	39,272,410
M.I.M. Holdings Ltd.		223,571	0.2				107,256,980	99.8	107,480,551
Neptune Gold Mining Co.		2,661,875	100.0						2,661,875
ASARCO Mexicana, S.A.***									108,163,720
General Cable		517,000	0.1						353,334,000
Revere Copper		4,341,000	1.3						340,159,000
Hecla Mining Co.		minimal							No Inform.**
Kennecott Copper		minimal							No Inform.**
Phelps Dodge		minimal							No Inform.**
United Park City Mines		minimal							No Inform.**

* Sales to other corporations whose dividends are apportioned by the State Tax Commission or which are unitized, if any.

** This data is not available from ASARCO records or published reports.

*** ASARCO acted as a commission agent for United States sales.

CHART D

1969

Corporations		Sales to ASARCO $ Amt. of sales	Sales to ASARCO % of total sales	Sales to Listed Corporations* corp. name	$ Amt. of sales	% of total sales	Sales to All Others $ Amt. of sales	% of total sales	TOTAL SALES 100% of total sales $ Amt.
Federated Metals of Canada	)	349,403	1.9	All Combined	2,934	–0–	17,710,670	98.1	18,063,007
ASARCO Mercantile Co.	)	990,538	54.0	Lake Asbestos	15,115	0.8			
	)			No. Peru	102,223	5.6			
	) U			Neptune Mines	64,523	3.6			
	) N			So. Peru	660,369	36.0			1,832,768
	) I			Federated Metal					
Enthone, Inc.	) T	324,235	4.6	of Canada	15,879	0.2	6,743,152	95.2	7,083,266
Int'l. Metal Co.	) I	4,873,475	41.9				6,756,564	58.1	11,630,039
Lone Star Lead Const.	) Z								
Corp.	) E	257,076	40.9				372,041	59.1	629,117
	) D								
	)								
No. Peru Mining Corp.	)	9,544,203	89.3	Int'l. Metal (incl. in sale to ASARCO)			1,146,318	10.7	10,690,521
ASARCO Australia		24,205	4.8				484,099	95.2	508,304
ASARCO Developments		10,000	19.7				40,708	80.3	50,708
ASARCO Exploration Company		47,594	100						47,594
Compania American Smelting, S.A.		none							none
Lake Asbestos of Quebec		none		ASARCO Int'l Corp.	12,252,332	77.9	3,472,867	22.1	15,725,199
ASARCO Int'l Corp.		none					12,609,908	100.0	12,609,908
So. Peru Copper Corp.		64,604,211	38.6	So. Peru copper sales	45,742,273	27.4	56,874,836	34.0	167,221,320
So. Peru Copper Sales Corp.		none					49,286,449	100.0	49,286,449
M.I.M. Holdings Ltd.		1,755,014	1.2				147,132,304	98.8	148,887,318
Neptune Gold Mining Co.		2,211,489	100.0						2,211,489
ASARCO Mexicana, S.A.***									111,602,437
General Cable		378,000	0.1						365,770,000
Revere Copper		6,012,000	1.7						363,321,000
Hecla Mining Co.		minimal							No Inform.**
Kennecott Copper		minimal							No Inform.**
Phelps Dodge		minimal							No Inform.**
United Park City Mines		minimal							No Inform.**

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* Sales to other corporations whose dividends are apportioned by the State Tax Commission or which are unitized, if any.

** This data is not available from ASARCO records or published reports.

*** ASARCO acted as a commission agent for United States sales.

CHART E

1970

Corporations		Sales to ASARCO $ Amt. of sales	Sales to ASARCO % of total sales	Sales to Listed Corporations* corp. name	$ Amt. of sales	% of total sales	Sales to All Others $ Amt. of sales	% of total sales	TOTAL SALES 100% of total sales $ Amt.
Federated Metals of Canada	)	130,253	0.8	All Combined	3,726	–0–	16,841,604	99.2	16,975,583
ASARCO Mercantile Company	) U	240,766	11.7	Lake Asbestos	29,048	1.4			
	) N			No. Peru	153,484	7.4			
	) I			Neptune Mines	132,830	6.4			
	) T			So. Peru	1,508,223	73.1			2,064,351
Enthone, Inc.	) I	1,131,930	17.0	Federated Metal of Canada	11,170	0.2	5,516,489	82.8	6,659,589
Int'l. Metal Co.	) Z	9,873,297							29,102,267
Lone Star Lead Const. Corp.	) E	831,529	68.4				384,503	31.6	1,216,032
	) D								
No. Peru Mining Corp.	)	10,100,802	99.7	Int'l. Metal (incl. in sale to ASARCO)			35,305	0.3	10,136,107
ASARCO Australia		32,577	4.8				651,550	95.2	684,127
ASARCO Developments		10,000	53.5				8,683	46.5	18,683
ASARCO Exploration Company		72,877	100.0						72,877
Compania American Smelting, S.A.		none							none
Lake Asbestos of Quebec		none		ASARCO Int'l Corp.	14,116,971	80.0	3,524,272	20.0	17,641,243
ASARCO Int'l Corp.		none					14,477,278	100.0	14,477,278
So. Peru Copper Corp.		56,410,642	21.5	So. Peru copper sales	42,921,408	16.4	162,972,229	62.1	262,304,279
So. Peru Copper Sales Corp.		none					41,624,234	100.0	41,624,234
M.I.M. Holdings, Ltd.		2,216,676	1.1				203,455,408	98.9	205,672,084
Neptune Gold Mining Co.		1,551,178	100.0						1,551,178
ASARCO Mexicana, S.A.***									113,901,319
General Cable		311,000	0.08						386,628,000
Revere Copper		4,210,000	1.28						328,345,000
Hecla Mining Co.		minimal							No Inform.**
Kennecott Copper		minimal							No Inform.**
Phelps Dodge		minimal							No Inform.**
United Park City Mines		minimal							No Inform.**

* Sales to other corporations whose dividends are apportioned by the State Tax Commission or which are unitized, if any.

** This data is not available from ASARCO records or published reports.

*** ASARCO acted as a commission agent for United States sales.

8. For the tax year 1968, a 5% stock ownership triggered a statutory presumption to the effect that all gains, losses, dividend and interest income are "an integral part of taxpayer's trade or business." For tax years 1969 and 1970, all gains, losses, dividend and interest income are presumed to be "an integral part of taxpayer's trade or business."

9. (a) The parties stipulate that none of the corporations set out below made any sales or purchases in Idaho, had any representation or agents in Idaho, held any real or personal property in Idaho, submitted tax returns to Idaho, or conducted any business activity in Idaho during the years 1968, 1969 and 1970, except that the State contends that the business activities of the parent corporation are attributable to the unitized corporations.

Federated Metals of Canada)
ASARCO Mercantile Company)
Enthone, Inc.) UNITIZED
Int'l. Metal Co.)
Lone Star Lead Const. Corp.)
No. Peru Mining Corp.)
ASARCO Australia
ASARCO Developments
ASARCO Exploration Company
Compania American Smelting, S.A.
Lake Asbestos of Quebec
ASARCO Int'l. Corp.
So. Peru Copper Corp.
So. Peru Copper Sales Corp.
M.I.M. Holdings Ltd.
Neptune Gold Mining Co.
ASARCO Mexicana, S.A.
Mexicana de Cobre, S.A.

9. (b) Information on sales and business activities by the following companies within the State of Idaho is not avail-

able to the parties and cannot be obtained from public records:

Kennecott Copper
Phelps Dodge
United Park City Mines
General Cable
Revere Copper
Hecla Mining Co.

10. The nature of the business operations of each of the corporations is:

Corporation	Nature of Business
Federated Metals of Canada	Processes and sells secondary metals.
ASARCO Mercantile Company	Purchase of machinery and equipment.
Enthone, Inc.	Production and sale of metal finishing chemicals.
Int'l. Metal Co.	Selling of ASARCO products abroad.
Lone Star Lead Const. Corp.	Lining of Tanks.
No. Peru Mining Corp.	Mines copper.
ASARCO Australia	Exploration company (Australia).
ASARCO Developments	Exploration company (New Zealand).
ASARCO Exploration Company	Exploration company (Canada).
Compania American Smelting, S.A.	Purchases ore in Chile.
Lake Asbestos of Quebec	Mining and selling asbestos.
ASARCO Int'l. Corp.	Sales corporation for Lake Asbestos.
So. Peru Copper Corp.	Mining copper.
So. Peru Copper Sales Corp.	Sells blister copper.
M.I.M. Holdings Ltd.	Production, smelting, refining and sale of copper, lead, silver and zinc.
Neptune Gold Mining Co.	Mining gold.
ASARCO Mexicana, S.A.	Mining, smelting and refining of copper.
Mexicana de cobre, S.A.	Land holding corporation.
General Cable	Manufacture and sale of cables.
Revere Copper	Manufacture and sale of copper wares.
Hecla Mining	Mining and sale of silver ore.
Kennecott Copper	Mining, smelting, refining and sale of copper.
Phelps Dodge	Mining, smelting, refining and sale of copper.
United Park City Mines	Mining silver, lead and zinc; owning and operating resort facilities.

11. The sources and amounts of Royalties, Capital Gains, Dividends and Interest for the years 1968, 1969 and 1970 are:

ROYALTIES

	1968	1969	1970
Total patent royalties	$ 863,495	$ 914,043	$ 1,144,753
Total mine royalties	24,057	26,201	24,357
Royalties paid by listed corporations:			
M.I.M. Holdings, Ltd.	33,323	34,342	26,919
Revere Copper	4,000	6,000	4,700

CAPITAL GAINS

	1968	1969	1970
Sale of M.I.M. Stock	$4,487,203	$2,230,370	$
Sale of Cia Minera de San Asidro y Aneyas stock	(645,817)		
Sale of Hecla Stock	3,753,251		141,098
Sale of U.S. Bonds (includes Federal Land Bank bonds)	118,906	81,406	
Sale of State & Local Bonds and notes	(1,723)	113,950	
Sale of Land, Buildings & Equipment**	16,232	98,089	51,952
Sale of U.S. Treasury Bonds			302,187
Sale of Connecticut 2-¼% Bonds			16,844
Sale of General Cable Stock			45,482,303
Sale of Zinc Industrial, S.A.			406,207
TOTALS	$7,728,052*	$2,523,815*	$46,400,591*

* This is also reported on the ASARCO federal returns.

** These represent Section 1245 recapture sales of property used in the business and are reported as ordinary income.

DIVIDENDS

		1968	1969	1970
Federated Metals of Canada	UNITIZED	$ None	$ None	$ None
ASARCO Mercantile	UNITIZED	12,500	15,000	140,000
Enthone, Inc.	UNITIZED	340,000	400,000	940,000
Int'l. Metal Co.	UNITIZED	50,000	200,000	
Lone Star Lead	UNITIZED	80,000	80,000	160,000
No. Peru Mining Corp.	UNITIZED	1,750,000	2,450,000	1,750,000
Compania American Smelting		15,687	26,385	
Lake Asbestos of Quebec, Ltd.		1,120,670	2,525,000	2,475,000
ASARCO Int'l. Corp.		70,000	80,000	135,000
So. Peru Copper Corp.		25,787,904	32,234,880	18,132,120
M.I.M. Holdings, Ltd.		9,661,070	20,466,130	33,647,396
ASARCO Mexicana, S.A.		1,882,918	1,882,918	1,882,918
General Cable		5,818,308	5,333,449	2,100,763
Revere Copper		2,814,444	2,814,444	2,345,370
Hecla Mining		91,729	46,242	11,561
Kennecott Copper Corp.		243,908	285,490	283,280
Phelps Dodge		269,850	300,690	323,820
Cia Minera de San Asidro y Aneyas, S.A.		50,557	-0-	-0-
Cia. Metalurgia Mex.		337,500	300,000	330,000
Japan Metal Finishing		8,454	6,081	11,383
Zinc Ind. S.A.		131,527	40,993	86,359
Purnix Enthone, S.A.			24,126	
Apache Power		5,600	7,600	8,000
TOTALS		$50,542,626*	$69,519,428*	$64,762,970*

* Total as shown in Federal Return for ASARCO

INTEREST

	1968	1969	1970
U.S. Government Securities	$1,182,989	$1,749,007	$2,239,199
United Park City Notes	12,000	12,000	12,000
Eisma Notes (sale of ASARCO Mexicana stock)	506,000	363,000	242,000
State and Local Bonds	330,489	672,635	111,023
Federated Metals of Canada, Ltd.		132,092	260,854
Revere Copper and Brass 5-¼% convertible debentures	1,251,965	1,251,965	1,251,965
N.Y. & Honduras Mining Co. Notes	24,559		
Bank Interest (fixed deposits)	63,306		
U.S. Reduction Corp. Notes		68,861	132,690
Sunshine Mining Company Notes		20,277	
Clayton Silver Mines Notes			25,375
Interest in connection with General Cable Sale			1,051,004
Neptune Gold Mining Note			4,673
Moran Notes (sale of Los Angeles plant)			56,250
Tax Refunds		17,579	329,296
Other Marketable Securities *	887,565	1,590,027	1,191,495
Other Interest Income	24,094	29,293	111,900
TOTALS	$4,282,917	$5,906,736	$7,019,724

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* *Other Marketable Securities:*			
Bankers Acceptances	$ 135,568	$ 360,833	$ 98,952
Time Certificates of Deposit	83,007	61,076	347,376
Commercial Paper Notes	668,990	1,168,118	746,402
Less amortization (time certificate deposits)	$ 887,565	$1,590,027	$1,192,760 (1,265)
TOTAL ABOVE	$ 887,565	$1,590,027	$1,191,495

12. ASARCO is incorporated in the state of New Jersey.

13. ASARCO's commercial domicile is the state of New York.

14. All corporate stock, bonds and other evidence of indebtedness owned by ASARCO are physically sited in New York.

DATED this 29th day of January, 1975.

CLEMONS, COSHO, HUMPHREY & SAMUELSEN

By: /s/ PHILIP E. PETERSON
Philip E. Peterson

By: /s/ R. MICHAEL SOUTHCOMBE
R. Michael Southcombe

Attorneys for American Smelting and Refining Company

STATE OF IDAHO

By: /s/ THEODORE V. SPANGLER, JR.
Theodore V. Spangler, Jr.

Attorney for State Tax Commission, State of Idaho

STATE OF IDAHO
STATE TAX COMMISSION
317 Main Street P.O. Box 3
Boise, Idaho

NOTICE OF DEFICIENCY DETERMINATION

Date March 27, 1973

To American Smelting & Refining Company
and Subsidiaries
120 Broadway
New York, New York 10005

In accordance with the provisions of Sec. 63-3045, Idaho Code, YOU ARE HEREBY NOTIFIED that the State Tax Commission has determined a deficiency in respect to the income taxes owed by you under the Idaho Income Tax Act for the year(s) and in the amount(s) as follows:

Year	Income Tax	Penalty	Interest	Total
1967	$ 1,938.86		$ 586.51	$ 2,525.37
1968	92,471.88	$4,623.59	22,424.43	119,519.90
1969	111,292.44	5,564.62	20,310.87	137,167.93
1970	121,750.76	6,087.54	14,914.47	142,752.77
				$401,965.97

The computations underlying and the reasons for said deficiency are set out in the attached Form 402, "Statement of Deficiency or Overassessment," which, by reference thereto, is incorporated herein.

YOU ARE FURTHER NOTIFIED that if you intend to protest this determination of deficiency you have thirty (30) days from the date this notice of deficiency was mailed or until April 26, 1973 to:

1. File a protest seeking redetermination thereof with the State Tax Commission at its offices at 317 Main Street, P.O. Box 36, Boise, Idaho 83707;

2. File a complaint in the District Court of Ada County or the County in which the taxpayer resides seeking redetermination thereof.

If no protest is filed with the State Tax Commission or if no complaint is filed with a District Court of this State within the time limits prescribed above, said deficiency becomes final; is due and payable; and action for collection of the above amount will be taken in accordance with law.

This deficiency may be paid immediately without awaiting formal assessment, notice and demand. Immediate payment will avoid additional interest being assessed which accrues at the rate of 6% per annum. Payment of this deficiency will not preclude the right of protest if such protest is made in accordance with the procedure and time limits prescribed above.

STATE TAX COMMISSION
INCOME TAX DIVISION
By _____
Title Corporation Auditor

STATE OF IDAHO STATE TAX COMMISSION

STATEMENT OF DEFICIENCY OR OVERASSESSMENT

TAXPAYER: American Smelting & Refining Company Serial No. 5192

Form 402 Rev. 9/69	ADJUSTMENTS TO INCOME—CORPORATIONS	Year/Period Ended 1967
Taxable income reported on return or as adjusted		$
Additional income and allowable deductions:		
1. Adjustments by revenue agent—net	$1,454,078	
Less: adjustment to state income taxes	(22,967)	
Less: adjustment to dividends—Mount Isa Mines Ltd.	202,411	
Additional apportionable income	1,633,522	
Idaho apportionment factor	1.9782%	32,314.33

Explanation of Items:

1. Adjustments by Internal Revenue Service applicable to Idaho.

Corrected taxable income	$32,314.33

COMPUTATION OF INCOME TAX—CORPORATIONS

Corrected income tax liability	$
Less—original tax paid on return or as previously adjusted	
Additional assessment	1,938.86
Interest at 6% from 4-15-68 to 4-30-73	586.51
TOTAL	$ 2,525.37

Date March 27, 1973

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STATE OF IDAHO REVISED STATE TAX COMMISSION

STATEMENT OF DEFICIENCY OR OVERASSESSMENT

TAXPAYER: American Smelting & Refining Company & Subsidiaries Serial No. 9-3388

Form 402 Rev. 9/69	ADJUSTMENTS TO INCOME—CORPORATIONS		Year/Period Ended 1968
Taxable income reported on return or as adjusted			$
Additional income and allowable deductions:			
1. Combined income per federal return			
American Smelting & Refining		$63,710,051	
Federated Metals Canada Ltd.		333,379	
ASARCO Mercantile Company		31,630	
Enthone, Inc.		712,575	
International Metal Company		139,377	
Lone Star Lead Construction Corp.		95,173	
Northern Peru Mining		2,106,745	
Add: Revenue Agents adjustments—net			
American Smelting & Refining		(528,355)	
Enthone, Inc.		(100)	
Add: Schedule M Interest income		345,194	
Less: Premium amortization		(14,704)	
Add: State taxes based on income $722,431—$288,082		434,349	
Deduct: Intercompany dividends		(2,232,500)	
Foreign dividend gross-up		(3,640,25[illegible])	
50% capital gain excess over capital loss		(3,864,026)	
85% dividend credit on qualifying dividends (Hecla Mining)		(77,970)	
Revised income subject to apportionment		57,550,563	
2. Idaho apportionment factor		2.67799%	1,541,198
Corrected taxable income			$ 1,541,198

COMPUTATION OF INCOME TAX—CORPORATIONS

Corrected income tax liability	$ 92,471.88
Less—original tax paid on return or as previously adjusted	
Additional assessment	92,471.88
Penalty 5%, Idaho Code, Section 63-3046 & Regulation 46(a)	4,623.59
Interest at 6% from 4-15-69 to 4-30-73	22,424.43
TOTAL	$119,519.90

Date March 27, 1973

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STATE OF IDAHO REVISED STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries Serial No. 9-3388

Form 402
Rev. 9/69

EXPLANATION OF ITEMS

Year/Period Ended
1968

1. The income of American Smelting & Refining Company, which has a business situs in the state of Idaho, is combined with these six wholly owned subsidiaries to arrive at Idaho apportionable income for the following reasons: The parent company, American Smelting & Refining Company (ASARCO), mines, mills, smelters, and refines in the United States and Canada, and is also engaged in the manufacture and sale of non-ferrous alloys. The six wholly owned subsidiaries are either engaged in similar operations or are conducting manufacturing or sales operations for the parent company. In addition ASARCO and its subsidiaries have interlocking officers and directors which enables ASARCO to control the subsidiaries' activities and major management decisions. Sales between the companies are numerous, and various services are provided either by the parent company or by subsidiaries specifically set up to render the services, including management, accounting, budgeting, tax preparation, exploration, research, purchasing, sales and insurance procurement.

2. Computation of Idaho apportionment factor:

Property factor	Everywhere 1967	Everywhere 1968	Idaho 1967	Idaho 1968	Percent
American Smelting & Refining Co.					
Inventories	128,414,103	142,485,441	920,224	615,522	
Add: Inventory located at mine in Idaho and not shipped to Montana plant due to strike			8,212,868		
Building, equipment, etc.	233,455,300	261,576,508	3,572,722	4,120,289	
Depletable assets	45,209,263	51,389,338			
Land	5,437,167	5,778,662	2,513,461	2,535,851	
Materials & supplies		13,331,400			
Total	412,515,833	474,555,349	15,219,275	7,271,622	
Federated Metals Canada Ltd.					
Inventories	2,281,864	2,634,317			
Buildings, equipment, etc.	2,544,267	2,566,635			
Total	4,826,131	5,200,952			
ASARCO Mercantile Co.					
Inventories	40,009				
Enthone, Inc.					
Inventories	484,638	470,309			
Buildings, equipment, etc.	1,530,496	1,568,737			
Land	345,011	345,011			
Supplies		141			
Total	2,360,145	2,384,198			

STATE OF IDAHO — REVISED — STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries — Serial No. 9-3388

Form 402 Rev. 9/69 — EXPLANATION OF ITEMS — Year/Period Ended 1968

Computation of Property Factor—continued	Everywhere 1967	Everywhere 1968	Idaho 1967	Idaho 1968	Percent
International Metal Co.					
Inventories	905,500	2,017,800			
Buildings, equipment, etc.	3,162	3,162			
Total	908,662	2,020,962			
Lone Star Lead Construction Co.					
Inventories	156,246	13,773			
Buildings, equipment, etc.	4,683	4,683			
Land		1,178			
Supplies	4,586	5,901			
Total	165,515	25,535			
Northern Peru Mining					
Inventories	3,568,658	2,968,510			
Buildings, equipment, etc.	8,379,599	8,551,902			
Depletable assets	2,126,057	2,126,057			
Land	115,195	115,195			
Total	14,189,509	13,761,664			
Grand Total	435,005,804	497,948,660	15,219,275	7,271,662	
Less: Construction in Progress					
ASARCO	(6,457,860)	(3,748,485)	(236,333)	(22,390)	
Enthone		(31,512)			
Adjust: Share of joint venture property	(7,941,219)	(16,930,040)			
Total end of year	420,606,725	477,238,623	14,982,942	7,249,272	
Total beginning of year		420,606,725		14,982,942	
		897,845,348		22,232,214	
Average owned property		448,922,674		11,116,107	
	1968		1968		
Capitalized rent expense					
American Smelting & Refining	5,513,784		478,999		
Federated Metals Canada	19,529				
International Metal	2,663				
Northern Peru	9,766				
Total annual rent expense	5,545,742		478,999		
Capitalized at 8 times		44,365,936		3,831,992	
Total Property		493,288,610		14,948,099	3.03029

STATE OF IDAHO — REVISED — STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries — Serial No. 9-3388

Form 402
Rev. 9/69

EXPLANATION OF ITEMS — Year/Period Ended 1968

Computation of Payroll Factor	Everywhere	Idaho	Percent
American Smelting & Refining	74,167,340	2,918,634	
Grand Due Joint Venture	2,210,533		
Federated Metals Canada Ltd.	1,263,403		
ASARCO Mercantile Company	17,480		
Enthone, Incorporated	1,431,858		
International Metal Company	46,686		
Lone Star Lead Construction	289,219		
Northern Peru Mining Co.	1,812,509		
Total Payroll	81,239,028	2,918,634	3.59265
Computation of Revenue Factor			
American Smelting & Refining			
Sales	263,660,446	as reported 66,530	
Mine sales attributed to Idaho mines as agreed by taxpayer		4,777,799	
Dividends $50,542,626 less gross-up $3,640,255	46,902,371		
U.S. government interest	1,182,989		
Other interest	2,777,499		
Rents	62,496		
Royalties	887,552		
Misc. Income	2,989,638		
Less—intercompany sales to International Metals	(5,944,111)		
Federated Metals Canada Ltd.	14,225,938		
ASARCO Mercantile Company	1,918,961		
Enthone, Inc.	5,796,139		
International Metal Co.	5,959,393		
Lone Star Lead Construction	488,931		
Northern Peru Mining	2,407,133		
	343,315,375	4,844,329	1.41104
Total percent			8.03398
Average percent—Idaho apportionment factor			2.67799

STATE OF IDAHO REVISED STATE TAX COMMISSION

STATEMENT OF DEFICIENCY OR OVERASSESSMENT

TAXPAYER: American Smelting & Refining Company & Subsidiaries Serial No. 70-2407

Form 402 Rev. 9/69	ADJUSTMENTS TO INCOME—CORPORATIONS		Year/Period Ended 1969
Taxable income reported on return or as adjusted			$
Additional income and allowable deductions:			
1. Combined income per federal return			
American Smelting & Refining Co.		$94,408,818	
Federated Metals Canada Ltd.		687,730	
ASARCO Mercantile Company		24,474	
Enthone, Incorporated		757,866	
International Metal Company		255,117	
Lone Star Lead Construction Corp.		158,972	
Northern Peru Mining		2,579,779	
Add: Schedule M interest income		679,030	
Less: Premium amortization		(6,395)	
Add: State taxes measured by income		1,010,333	
Deduct: Intercompany dividends		(3,145,000)	
Foreign dividend gross-up		(6,276,623)	
50% capital gain excess over capital loss		(1,271,079)	
85% dividend credit on Hecla dividends		(39,305)	
Revised income subject to apportionment		89,823,717	
2. Idaho apportionment factor		2.53246%	2,274,750
Corrected taxable income			$ 2,274,750

COMPUTATION OF INCOME TAX—CORPORATIONS

Corrected income tax liability	$136,485.00
Less—original tax paid on return or as previously adjusted	25,192.56
Additional assessment	111,292.44
Penalty 5%, Idaho Code, Section 63-3046 & Regulation 46(a)	5,564.62
Interest at 6% from 4-15-70 to 4-30-73	20,310.87
TOTAL	$137,167.93

STATE OF IDAHO

REVISED

STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries

Serial No. 70-2407

Form 402
Rev. 9/69

EXPLANATION OF ITEMS

Year/Period Ended
1969

1. The income of American Smelting & Refining Company, which has a business situs in the state of Idaho, is combined with these six wholly owned subsidiaries to arrive at Idaho apportionable income for the following reasons: The parent company, American Smelting & Refining Company (ASARCO), mines, mills, smelters, and refines in the United States and Canada, and is also engaged in the manufacture and sale of non-ferrous alloys. The six wholly owned subsidiaries are either engaged in similar operations or are conducting manufacturing or sales operations for the parent company. In addition ASARCO and its subsidiaries have interlocking officers and directors which enables ASARCO to control the subsidiaries' activities and major management decisions. Sales between the companies are numerous, and various services are provided either by the parent company or by subsidiaries specifically set up to render the services, including management, accounting, budgeting, tax preparation, exploration, research, purchasing, sales and insurance procurement.

2. Computation of Idaho apportionment factor:

Property factor

	Everywhere		Idaho		Percent
	1968	1969	1968	1969	
American Smelting & Refining Co.					
Inventories	142,485,441	154,615,834	615,522	444,736	
Buildings, equipment, etc.	261,570,508	272,672,939	4,120,289	9,679,056)	
Depletable assets	51,389,338	57,400,000		)	
Land	5,778,662	6,129,568	2,535,851	)	
Triangle Mine				13,095	
Materials & supplies	13,331,400	13,944,900			
Total	474,555,349	504,763,241	7,271,662	10,136,887	
Federated Metals Canada Ltd.					
Inventories	2,634,317	2,623,100			
Buildings, equipment, etc.	2,566,635	2,586,960			
Total	5,200,952	5,210,060			
Enthone, Inc.					
Inventories	470,309	505,322			
Buildings, equipment, etc.	1,568,737	1,729,427			
Land	345,011	341,481			
Supplies	141	136			
Total	2,384,198	2,576,366			
International Metal					
Inventories	2,017,800	1,116,044			
Buildings, equipment, etc.	3,162	4,413			
Total	2,020,962	1,120,457			
Lone Star Lead Construction Corporation					
Inventories	13,773	52,864			
Buildings, equipment, etc.	4,683	5,867			
Land	1,178				
Supplies	5,901	5,845			
Total	25,535	64,576			

STATE OF IDAHO REVISED STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries Serial No. 70-2407

Form 402
Rev. 9/69

EXPLANATION OF ITEMS

Year/Period Ended 1969

Computation of Property Factor—continued	Everywhere 1968	Everywhere 1969	Idaho 1968	Idaho 1969	Percent
Northern Peru Mining					
Inventories	2,968,510	3,238,381			
Buildings, equipment, etc.	8,551,902	8,689,518			
Depletable assets	2,126,057	2,126,057			
Land	115,195	115,195			
Total	13,761,664	14,169,151			
Grand Total	497,948,660	527,903,851	7,271,662	10,136,887	
Adjustments					
Less: Construction in progress					
ASARCO	(3,748,485)	(3,726,621)	(22,390)	(7,465)	
Enthone	(31,512)	(16,093)			
Less: Adjustment required to adjust share of joint venture property	(16,930,040)	(16,912,298)			
Total end of year	477,238,623	507,248,839	7,249,272	10,129,422	
Total beginning of year		477,238,623		7,249,272	
		984,487,462		17,378,694	
Average owned property		492,243,731		8,689,347	
	1969		1969		
Capitalized rent expense					
ASARCO	7,135,773		800,295		
Federated Metals—Canada	18,971				
International Metal	2,763				
Northern Peru	9,678				
Total annual rent expense	7,167,185		800,295		
Capitalized at 8 times		57,337,480		6,402,360	
Total property		549,581,211		15,091,707	2.74604
Computation of Payroll Factor					
American Smelting & Refining		92,117,371		3,458,589	
Grand Due Joint Venture		1,331,929			
Federated Metals Canada, Ltd.		1,341,718			
Enthone, Incorporated		1,387,102			
International Metal Company		45,371			
Lone Star Lead Construction Corp.		301,726			
Northern Peru Mining		2,217,339			
Total Payroll		98,742,547		3,458,589	3.50263

STATE OF IDAHO REVISED STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries Serial No. 70-2407

Form 402 Rev. 9/69	EXPLANATION OF ITEMS		Year/Period Ended 1969	
Computation of Revenue Factor	Everywhere 1969		Idaho 1969	Percent
American Smelting & Refining Co.				
Sales	347,637,780	as reported	71,929	
Mines sales attributed to Idaho mines as agreed by taxpayer			5,959,447	
Dividends $69,519,428 less gross-up $6,276,623	63,242,805			
U.S. Government interest	1,749,007			
Other interest	3,528,901			
Rents	62,385			
Royalties	940,244			
Misc. income	3,812,195			
Less: Intercompany sales	(11,613,799)			
Federated Metals Canada, Ltd.	16,209,913			
ASARCO Mercantile Company	1,163,699			
Enthone, Inc.	7,034,812			
International Metals Co.	11,786,290			
Lone Star Lead Construction	372,041			
Northern Peru Mining	1,266,287			
Total Gross Revenue	447,192,560		6,031,376	1.34872
Total Percent				7.59739
Average Percent, Idaho apportionment factor				2.53246

STATE OF IDAHO — STATE TAX COMMISSION

STATEMENT OF DEFICIENCY OR OVERASSESSMENT

TAXPAYER: American Smelting & Refining Company & Subsidiaries — Serial No. 71-2922

Form 402 Rev. 9/69	ADJUSTMENTS TO INCOME—CORPORATIONS		Year/Period Ended 1970
Taxable income reported on return or as adjusted			$
Additional income and allowable deductions:			
1. Combined income per federal return			
American Smelting & Refining Co.		$119,750,988	
Federated Metals Canada, Ltd.		81,303	
ASARCO Mercantile Company		20,234	
Enthone, Incorporated		430,921	
International Metal Company		251,379	
Lone Star Lead Construction Corp.		210,347	
Northern Peru Mining		1,640,411	
Add: Schedule M interest income		114,623	
Less: Premium amortization		(3,600)	
Add: State taxes based on income		1,067,566	
Deduct: Intercompany dividend		(2,990,000)	
Foreign dividend gross-up		(8,522,350)	
50% capital gain excess over capital loss		(23,213,763)	
85% dividend credit on Hecla dividends		(9,827)	
Net income subject to apportionment		88,828,232	
2. Idaho apportionment factor		2.43430%	2,162,346
Corrected taxable income			$ 2,162,346

COMPUTATION OF INCOME TAX—CORPORATIONS

Corrected income tax liability	$129,740.76
Less—original tax paid on return or as previously adjusted	7,990.00
Additional assessment	121,750.76
Penalty 5%, Idaho Code, Section 63-3046 & Regulation 46(a)	8,887.54
Interest at 6% from 4-15-71 to 4-30-73	14,914.47
TOTAL	$142,752.77

Date March 27, 1973

STATE OF IDAHO — STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries — Serial No. 71-2922

Form 402
Rev. 9/69

EXPLANATION OF ITEMS

Year/Period Ended 1970

1. The income of American Smelting & Refining Company, which has a business situs in the state of Idaho, is combined with these six wholly owned subsidiaries to arrive at Idaho apportionable income for the following reasons: The parent company, American Smelting & Refining Company (ASARCO), mines, mills, smelters, and refines in the United States and Canada, and is also engaged in the manufacture and sale of non-ferrous alloys. The six wholly owned subsidiaries are either engaged in similar operations or are conducting manufacturing or sales operations for the parent company. In addition ASARCO and its subsidiaries have interlocking officers and directors which enables ASARCO to control the subsidiaries' activities and major management decisions. Sales between the companies are numerous, and various services are provided either by the parent company or by subsidiaries specifically set up to render the services, including management, accounting, budgeting, tax preparation, exploration, research, purchasing, sales and insurance procurement.

2. Computation of Idaho apportionment factor:

Property factor	Everywhere 1969	Everywhere 1970	Idaho 1969	Idaho 1970	Percent
American Smelting & Refining Co.					
Inventories	154,615,834	205,344,661	444,736	630,569	
Buildings, equipment, etc.	272,672,939	303,020,543	9,679,056	12,035,605	
Depletable assets	57,400,000	71,145,901			
Land	6,129,568	11,979,294			
Triangle Mine			13,095	13,095	
Material & supplies	13,944,900	15,335,000			
Total	504,763,241	606,825,399	10,136,887	12,679,269	
Federated Metals Canada Ltd.					
Inventories	2,623,100	2,397,325			
Buildings, equipment, etc.	2,586,960	2,585,065			
Total	5,210,060	4,982,390			
Enthone, Inc.					
Inventories	505,322	557,561			
Buildings, equipment, etc.	1,729,427	1,756,994			
Land	341,481	341,481			
Supplies	136	136			
Total	2,576,366	2,656,172			
International Metal Co.					
Inventories	1,116,044	819,064			
Buildings, equipment, etc.	4,413	6,217			
Total	1,120,457	825,281			
Lone Star Lead Construction Corp.					
Inventories	52,864	44,287			
Buildings, equipment, etc.	5,867	7,016			
Supplies	5,845	9,866			
Total	64,576	61,169			

STATE OF IDAHO REVISED STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries Serial No. 71-2922

Form 402
Rev. 9/69

EXPLANATION OF ITEMS

Year/Period Ended 1970

Computation of Property Factor—continued	Everywhere 1969	Everywhere 1970	Idaho 1969	Idaho 1970	Percent
Nortern Peru Mining					
Inventories	3,238,381	3,328,541			
Buildings, equipment, etc.	8,689,518	8,788,917			
Depletable assets	2,126,057	2,126,057			
Land	115,195	10,013			
Total	14,169,151	14,253,528			
Grand Total	527,903,851	629,603,939	10,136,887	12,679,269	
Less: Construction in progress					
ASARCO	(3,726,621)	(2,319,283)	(7,465)	(23,931)	
Enthone	(16,093)	(25,028)			
Property acquired 11/23/70		(28,211,513)			
Adjustment required to adjust share of joint venture property	(16,912,298)	4,553,889			
Joint venture put in use 11/1/70		(16,912,298)			
Total end of year	507,248,839	586,689,706	10,129,422	12,655,338	
Total beginning of year		507,248,839		10,129,422	
		1,093,938,545		22,784,760	
Average owned property		546,969,272		11,392,380	
Capitalized rent expense	1970		1970		
American Smelting & Refining	6,577,601		1,130,551		
Federated Metals—Canada	17,222				
International Metal	2,943				
Northern Peru	25,369				
Total annual rent expense	6,623,135		1,130,551		
Capitalized at 8 times		52,985,080		9,044,408	
Add: Property acquired 11/23/70 weighed		2,350,959			
Property put into use 11/1/70		2,818,716			
Total property		605,124,027		20,436,788	3.37729

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STATE OF IDAHO — REVISED — STATE TAX COMMISSION

TAXPAYER: American Smelting & Refining Company & Subsidiaries — Serial No. 71-2922

Form 402
Rev. 9/69

EXPLANATION OF ITEMS

Year/Period Ended 1970

Computation of Payroll Factor:	Everywhere 1970	Idaho 1970	Percent
American Smelting & Refining	98,112,241	3,238,074	
Grand Due Joint Venture	3,367,697		
Federated Metals Canada Ltd.	1,726,545		
Enthone, Incorporated	1,760,063		
International Metal Company	54,452		
Lone Star Lead Construction	461,723		
Northern Peru Mining	2,428,351		
Total Payroll	107,911,072	3,238,074	3.00069
Computation of Revenue Factor:			
American Smelting & Refining Co.			
Sales	348,625,070	as reported 177,120	
Mine sales attributed to Idaho mines as agreed by taxpayer		4,378,966	
Dividends $64,762,970 less gross-up $8,522,350	56,240,620		
U. S. Government interest	2,239,199		
Other interest	4,682,474		
Rents	61,905		
Royalties	1,169,110		
Misc. income	4,004,016		
Sale of General Cable stock	48,688,104		
Federated Metals Canada Ltd.	17,121,672		
ASARCO Mercantile Company	2,064,350		
Enthone, Inc.	6,898,180		
International Metal Co.	196,336		
Lone Star Lead Construction	384,503		
Northern Peru Mining	210,282		
	492,585,821	4,556,086	.92493
Total percent			7.30291
Average percent, Idaho apportionment factor			2.43430

MTC AUDIT REPORT

AMERICAN SMELTING AND REFINING COMPANY
FEIN 13-4924440

The subject taxpayer, hereinafter referred to as ASARCO, is engaged in two areas of operation:

1. Primary Metals—mining, milling, smelting, and refining non-ferrous metals
2. Non-Ferrous Alloys—manufacture and sale

For simplicity, each operation is discussed separately.

Primary Metals

ASARCO operates mines, mills, smelters, and refineries in the United States and Canada. In South and Central America, subsidiaries are engaged in mining and smelting operations.

Primary metal ores extracted from mines are lead, copper, zinc, gold, and silver. The ore extracted from company mines is shipped to company smelters and, in turn, is shipped to company refineries and ultimately sold by the New York sales office.

In addition to smelting and refining its own ore, ASARCO treats ore for independent miners on a toll basis. The taxpayer also purchases ore from independent mine operators which it treats and sells for its own account.

By-products resulting from smelting and refining operations are sold by the taxpayer's sales office in New York or by the local plant managers.

ASARCO has mines in Colorado, Washington, Arizona, New Mexico, Idaho, and Canada. Company smelters and/or refineries are located in Texas, Maryland, Colorado, Montana, Missouri, California, Nebraska, Arizona, New Jersey, and Washington.

Non-Ferrous Alloys

Through its Federated Metals Division, ASARCO is engaged in the manufacture and sale of non-ferrous alloys such as aluminum alloys, bismuth alloys, brass ingot, caulking lead, copper anodes, magnesium alloys, nickel alloys, tin, and zinc dust, to name just a few of more than 75 different products.

Federated Metals has plants in Texas, New Jersey, California, Oklahoma, and Indiana. Its sales offices are located in Baltimore, Boston, Cincinnati, Cleveland, Detroit, Milwaukee, Philadelphia, Rochester, and St. Louis. In addition, each plant has sales personnel attached to it who call on customers to solicit orders.

On November 23, 1970, ASARCO entered into another field of operation, the mining and selling of coal. It acquired four mining properties from Peabody Coal Company, a subsidiary of Kennecott Copper, for $24,283,000 in cash and a reserved production payment obligation of $3,000,000. The properties are located in Illinois and are operated as the Midland Coal Company, a division of ASARCO.

Related Companies

The following companies are wholly-owned subsidiaries of ASARCO

1. *Federated Metals of Canada*

This company is located in Canada and is engaged in the smelting, refining, and sale of secondary metals similar to the operations of the Federated Metals Division of ASARCO.

2. *ASARCO Mercantile Company*

This company is located in New York City and is engaged in the purchase and sale of machinery and equipment for ASARCO subsidiaries.

3. *Enthone, Inc.*

This company is headquartered in Westhaven, Connecticut. It has plants in Connecticut, Illinois, and Ohio which are engaged in the manufacture and sale of metal finishing chemicals and supplies. Sales are made on a regional basis.

4. *International Metal Company*

This company conducts a sales operation exclusively for ASARCO. It has offices in New York City and Brussels, Belgium, where it takes orders for metals to be delivered to foreign customers.

5. *Lone Star Lead Construction Corporation*

This company is located in Houston, Texas and is engaged in lining tanks with lead where corrosive products are used. Its customers are primarily in the chemical industry. Company operates throughout the United States.

6. *Northern Peru Mining Corporation*

This company is located in Peru and is engaged in mining for copper, lead, silver, and zinc. Its production is sold primarily to ASARCO.

7. *ASARCO Australia*

8. *ASARCO Developments*

9. *ASARCO Exploration Company*

These three companies are engaged in exploration activities for ASARCO.

10. *Compania American Smelting, S. A.*

This is an office in Chile that purchases ore for ASARCO units.

11. *Lake Asbestos of Quebec*

This company is engaged in extracting and processing asbestos fibres in Canada. The company sells its finished products throughout the world.

12. *ASARCO International Corporation*

This company sells the asbestos fibres of Lake Asbestos all over the world.

The following companies are owned by ASARCO, in which the ownership is less than 100% but more than 50%:

1. *Southern Peru Copper Corporation—51.5% owned by ASARCO*

This subsidiary is an American corporation whose activities are confined to Peru. This company operates an open pit copper mine and mill at Toquepala in southern Peru and a smelter, power plant and port at Ilo on the seacoast. The other stockholders are Phelps Dodge, 16%; Newmont Mining, 10.25%; and Cerro Corporation, 22.25%.

The end product of this company is blister cooper, which it sells to Southern Peru Copper Sales Corporation and to the stockholders in proportion to their stock ownership. The sales to the stockholders are made after the Southern Peru Sales Corporation commitments are satisfied.

2. *Southern Peru Copper Sales Corporation—51.5% owned by ASARCO*

This company sells blister copper which it purchases from Southern Peru Copper Corporation. The sales are made by the ASARCO sales office in New York, for which that office earns a sales commission. Sales are generally made to foreign customers.

The stock ownership in this company is the same as in Southern Peru Copper Corporation.

3. *M.I.M. Holdings Ltd.—52.7% owned by ASARCO*

This company was formerly known as Mount Isa Mines Ltd. M.I.M. encompasses a complex of mining, mill-

ing, smelting, and refining operations for copper, lead, zinc, and silver in Australia and a lead and silver refinery in England.

4. *Neptune Gold Mining Company—51.8% owned by ASARCO*

This company conducts a gold mining operation in Nicaragua. The ore is shipped to ASARCO plants in the United States.

The following companies are owned less than 50% by ASARCO:

1. *ASARCO Mexicana, S. A.—49% owned by ASARCO*

This company mines and smelts lead and copper in Mexico. It is also engaged in coal mining in that country. ASARCO provides this company with technical services, and it handles the company's sales outside of Mexico.

2. *Mexicana de Cobre, S. A.—49% owned by ASARCO Mexicana*

This company holds mineral lands in Mexico.

Unitary Business Operations

The examiner has considered the following wholly-owned companies to be engaged in a unitary business operation with ASARCO and is, therefore, recommending a combined report:

1. Federated Metals of Canada
2. ASARCO Mercantile Company
3. Enthone, Inc.
4. International Metal Company
5. Lone Star Lead Construction Corporation
6. Northern Peru Mining Corporation

In addition to the above companies, two 51.5% owned subsidiaries were deemed unitary and were combined only for those states in which ownership of less than 80% presents no problem. These subsidiaries are Southern Peru Copper Corporation and Southern Peru Copper Sales Corporation.

The following companies, though deemed unitary with ASARCO, were *not* included in the combined report because their relatively small operations would have minor tax effects. These companies are:

1. ASARCO Australia—exploration
2. ASARCO Developments—exploration
3. ASARCO Exploration—exploration
4. Neptune Gold Mining—mining
5. Compania American Smelting, S. A.—buying office

The unitary features present during this audit period are discussed below.

1. *Ownership*

ASARCO owns over 50% of the stock in the companies being combined and, thereby, is capable of exercising control over the companies' activities.

2. *Related Fields*

ASARCO, with its subsidiaries, conducts a vertically integrated non-ferrous metals operation. This is evidenced by the flow from the mines to the smelters to the refineries and ultimately to the sales made by the New York office.

3. *Interlocking Officers and Directors*

ASARCO and its subsidiaries have interlocking officers and directors, which enables ASARCO to control the major management decisions of each subsidiary.

4. *Flow of Product*

Sales between the companies were numerous. ASARCO sold metal to Federated Metals of Canada, anywhere from $662,834 in 1967 to $1,053,588 in 1970. Federated Metals of Canada sold smaller amounts back to ASARCO, ranging from $130,253 to $349,403. These amounts represented approximately 1% of Federated's sales.

Lone Star Lead Construction Corporation purchased most of its lead requirements from ASARCO.

Northern Peru Mining Corporation sold practically all of its ore production to ASARCO.

Enthone purchased approximately 16% of its material from ASARCO and sold about 4.5% of its total sales to its parent.

Southern Peru Copper sold directly to ASARCO about 35% of its total sales. Sales to ASARCO were as follows:

1967	$44,096,604
1968	$49,824,905
1969	$64,604,211
1970	$56,410,642

Sales made to Southern Peru Copper Sales were as follows:

1967	$38,885,755
1968	$39,522,877
1969	$45,742,273
1970	$42,921,408

It is apparent from the above that the companies supplied markets to each other—in some cases very substantial markets, and in other instances minor markets.

5. *Flow of Services*

There were various services provided the ASARCO group either by the parent company or by subsidiaries specifically set up to render the services.

a. ASARCO Mercantile bought and sold equipment and machinery for all ASARCO subsidiaries except M.I.M.

b. International Metals Company acted as a foreign sales agent solely for ASARCO.

c. Central exploration service is provided the ASARCO companies either by the exploration division of ASARCO or its exploration subsidiaries.

d. ASARCO's sales office in New York handles the sales of Southern Peru.

e. ASARCO's tax department prepares or supervises the preparation of tax returns for all United States companies.

f. There is a central research department working with programs closely associated with exploration, ore benefication, smelting, refining, product application, and product development. The findings of this department are available to all members of ASARCO.

Enthone conducts its own research center.

g. Central insurance department secures property and casualty insurance coverage for ASARCO and the wholly-owned North American companies.

h. Accounting and budgeting is centrally provided by ASARCO for its wholly-owned subsidiaries except for Enthone.

i. ASARCO's audit staff examines the operations of the subsidiaries with the exception of Southern Peru and M.I.M. This enables ASARCO to know whether the subsidiaries are operating along the lines set down by its management.

In addition to the above unitary factors, the following factors existed between Federated Metals of Canada and ASARCO:

ASARCO charged Federated Metals for technical, managerial, engineering, and scientific services. During the audit period, the charges were as follows:

1967	$22,856
1968	$12,882
1969	$18,514
1970	$16,432

In 1969, ASARCO provided financing for Federated Metals. The interest charges were as follows:

1969	$142,213
1970	$261,253

There were some minor amounts of sales handled by each company for the other.

The unitary factors between Southern Peru and ASARCO not mentioned before are as follows:

ASARCO charged Southern Peru for technical services, loaned Southern Peru technical personnel, and had the right to name 6 of 13 directors. The thirteenth director was agreed upon by all stockholders jointly.

Companies not combined and not deemed unitary were M.I.M., Lake Asbestos, and ASARCO International.

M.I.M., though operating in a related field and controlled by ASARCO, did not have significant unitary factors to warrant combining it with its parent company. Sales to ASARCO were less than 1% of M.I.M. total sales. There were sales made by ASARCO for M.I.M. for which a commission was paid but, again, was not significant.

Lake Asbestos and ASARCO International, though unitary with each other, were not considered unitary with ASARCO. They operate in an unrelated field. There was no flow of product; mining and processing know-how differed; customers were different; no joint sales force existed; and there was no sharing of facilities. There were some unitary factors such as ownership and some management services, but not enough to consider combining these two companies with ASARCO.

RAR Adjustments

IRS has completed its examination of the years 1967 and 1968. Their adjustments have been incorporated into our computation of income.

The years 1969 and 1970 are presently under audit.

Adjustments to Income

The discussion on business income is general and will not, at times, pertain to an individual state because of its laws or interpretation of business income.

There were many adjustments made to income for the years 1967 through 1970, and these are discussed below.

ASARCO filed its returns, reporting its operations only and using formula to apportion income. This auditor has revised income to reflect combined reporting for the years 1967 through 1970.

The taxpayer treated all passive income as non-business. The auditor has reversed this treatment and was guided by the Multistate Tax Compact Regulations adopted in 1971. The auditor took income as reported for federal purposes, thereby avoiding the need to make the adjustments to restore the passive income to business income.

Dividend Income

Dividends were primarily intercompany, mostly coming from Mount Isa and Southern Peru Copper. Dividends from General Cable and Revere Copper were treated as business because these two companies were very large customers of ASARCO. General Cable purchased each year between $30,700,000 to $45,791,231 in metal from ASARCO; and Revere purchased between $16,374,674 to $29,294,217 each year. Both companies also had quite a bit of toll treatment done on their metal concentrate by ASARCO.

Intercompany dividends from companies included in the combined report have been eliminated from income.

Interest Income

Interest income was treated as business income. Interest from U. S. obligations was removed from income where the state imposed an income tax instead of a franchise tax.

Interest income from customers' notes or bonds was treated as business income.

Interest on notes from U. S. Reduction for the purchase of the Federated plant in Alton, Illinois was treated as business, as was the interest from notes taken on the sale of General Cable stock.

Schedule M interest income was also added back to business income, as was interest income from state and municipal bonds.

Interest on time certificates, bankers acceptances, and commercial paper was also treated as business income.

Rental Income

Rental income was treated as business income in all years. This income is, for the most part, from homesites rented to employees working near company mines and plants.

Royalty Income

Royalty income was treated as business income. This income accrues from two sources:

1. Mine Royalties—earned when the taxpayer leases a portion of its mineral land to outsiders
2. Patents—developed by the taxpayer's research department which are used in the taxpayer's business and which are also licensed to unrelated parties

Capital Gains and Losses

The gains and losses have been treated as business income. This category is composed of a number of items, each of which will be discussed separately.

1. *Fixed Assets (1231, 1245, and 1250 Assets)*

These are business assets used in the taxpayer's regular everyday business activities and, therefore, give rise to business income or loss when they are sold.

2. *Notes and Bonds*

These assets are primarily acquired with idle cash in order to earn a return while the funds are not needed. The holding period, mostly, is less than a year. The nature of these securities are U.S. Treasury notes and bonds, and state and municipal notes and bonds.

In 1967 a loss of $5,064,759 on a note taken in connection with the sale of stock of Compania Minera ASARCO, a 51% subsidiary, was allowed as a business loss.

3. *Sale of Securities*

Gains and losses on the sales of securities were picked up as business income where the stock was from a company that was engaged in a significant amount of business activity with the taxpayer.

In 1967 a $4,319,606 gain on the sale of Kennecott Copper stock was included in business income because Kennecott was a major customer of ASARCO until Kennecott opened its own smelters and refineries.

In 1968 and 1970 the gain on the sale of Hecla Mining stock was treated as business income. Part of the stock, 25,230 shares, was acquired from Hecla as payment for the Morning Mine it purchased from ASARCO. The balance of the shares was purchased in the open market and through stock splits.

In 1968 and 1969 the gains and losses on the sales of stocks in subsidiaries were included in business income.

In 1970 the taxpayer realized a gain of $45,482,303 on the sale of General Cable stock. This gain was treated as business income.

General Cable represented a large market for the taxpayer's metal and, in fact, purchased on average 6% of ASARCO's total sales. The auditor contends that ASARCO's motive in acquiring 34% of General Cable's stock was for business purposes. It was to insure itself of a market for its production of metal. ASARCO also voted its stock at annual meetings, thereby having a voice in General Cable's operations, including the company's purchasing policies.

In 1961, the Justice Department moved against ASARCO for its interest in both General Cable and Revere Copper, claiming violation of antitrust laws. In 1970 the company was finally forced to divest of its holdings in General Cable. The Justice Department's success in forcing ASARCO to divest points out that the acquisition was not purely investment, but business motivated.

Many large metal extraction companies also engage in fabricating. This gives them the ideal type of vertical integration, from the raw material to the marketable end

product for sale to the consumer. ASARCO did not directly enter the fabricating business on its own. It appears that ASARCO chose to get into this end of the business through control, though limited, of fabricating companies. Examples of this approach can be seen in ASARCO's purchase of Revere Copper common stock, which represents 33.4% ownership in that company plus $22,763,000 in 5½% convertible debentures. Also pointed out previously was the large holdings in General Cable, another fabricator, without its own source of metals.

Presently, ASARCO is limited in its relations with Revere Copper through an antitrust consent decree signed in March 1967. These limitations are as follows:

Limitations:

1. No common officers
2. ASARCO is forbidden to vote its stock
3. ASARCO is restrained from selling refined copper to Revere at prices more favorable than those quoted competitors of Revere
4. ASARCO is forbidden to acquire stock in any producer or seller of fabricated copper products.

A similar decree was signed in 1967 for ASARCO's holdings in General Cable.

APPORTIONMENT FACTORS—DENOMINATORS

Property Factor

Property was checked to balance sheets, property workpapers, and rent schedules; and revisions were required in all years.

The property was reported by the taxpayer at original cost without excluding construction in progress. Rents were reported differently in certain states. In states where the taxpayer paid little or nothing for mine leases, these

payments were treated as rents by the taxpayer, thereby increasing the denominator with little or no effect on the numerator. In a state where the lease payments were large, the taxpayer did not consider these payments as rents, thereby not increasing the numerator or the denominator. The overall effect was to keep the apportionment factor down in as many states as possible by interpreting the same payments in two different ways for apportionment purposes.

The auditor reviewed the mine lease agreements and considered all payments as rents. Therefore, all payments were capitalized at 8 times. Rents on facilities and personal property were reviewed, and no errors were noted.

Construction in progress was adjusted for all years examined. It was difficult to determine the exact amount of property under construction because the taxpayer would use certain parts of a facility already completed, although the rest of the facility may still be in the construction phase. It was decided to consider a facility no longer under construction if 70% of the cost had been expended. If less than 70% had been expended, then the entire facility was still deemed to be under construction. This approach appears to simplify a time consuming task that would not justify the amount of additional tax that might accrue.

The auditor used the construction cost budget to determine the 70%. These budgets showed each job in construction, the state where located, the estimated cost, and the cost expended to date.

The taxpayer included investment costs and construction in progress in valuing the joint venture property of Grand Due. The auditor used the Grand Due federal tax return, Form 1065, and computed the property of the venture and then computed taxpayer's share. The difference between the taxpayer's reported figures and the auditor's revised figures appears as an adjustment to property everywhere.

In 1970 two properties were placed into use—one on November 1, 1970; the other on November 23, 1970. The auditor weighted both properties for the first time used during 1970.

In addition to the above adjustments, the property was computed on a combined basis.

The auditor did not handle inventory in transit in the conventional way. Ordinarily, inventory in transit would be picked up in the numerator of the destination state. With the taxpayer, the problem was that only partial records were prepared for inventory in transit. There was no accountability for all the in-transit inventory, and the taxpayer said at this late date it would be extremely difficult to develop this data. For practical purposes, no consideration was given to inventory in transit. Inventory on plant books was treated as at the plant. For example, Plant A ships metal to Plant B for processing, but Plant B has not received or booked the metal. For audit purposes, the inventory would still be considered at Plant A until notification was received to remove the inventory from its books.

Payroll Factor

The only revision required to payroll was to place it on a combined basis. Payrolls were reported on the accrual basis. Payrolls of subsidiaries filing U. S. Federal returns were taken from the returns. In the case of foreign companies, payrolls are per books, converted into U. S. dollars.

Sales Factor

Sales proved to be mess. [sic] The taxpayer reports sales in two ways. Primary metal sales are reported on a margin basis, which records these sales on a service rendered theory. The revenue is attributed to each facility that had performed some work in processing the metal. Where the company handles each phase of processing from extracting ore to refining, the entire sale will be reflected. Where the

company purchases the ore, the revenue on a margin basis is lower than on a sales basis because the company records as revenue only the services it renders on the purchased metals.

Secondary metals are reported on a destination basis, as are by-product sales.

The taxpayer used two methods for reporting the sales denominator. In states where primary metal sales were not a factor, the taxpayer used gross sales in the denominator, thereby increasing the denominator anywhere from $280,000,000 to $379,000,000 without having to revise the numerator. In states where processing is rendered to the metals, the taxpayer did not attempt to gross up margin figures and, in some instances, claimed the service revenue was intercompany and eliminated the revenue from the numerator but not the denominator.

The taxpayer does not maintain records of gross sales on a destination basis. For federal tax purposes, it reports on a margin basis, too. Since the taxpayer elects to report on a margin basis for federal purposes, the auditor is using this method for apportionment purposes.

The auditor added to the revenue denominator all the passive income that was picked up as business income. In the case of sales of capital assets, the taxpayer elected not to report these sales. But in 1970, the auditor did include the sale of General Cable stock in the denominator because the profit picked up in income was approximately 92% of the sale. To ignore the sale in the denominator would, in the auditor's opinion, attribute more income to states than they would be entitled to tax.

The taxpayer raised a question about the elimination of intercompany sales to International Metal Company. If the sales of primary metal to International Metal were made from company-extracted ore, then the adjustment is correct. If the metal sales were made out of ore purchased

from outside sources, then the adjustment is overstated. Since the taxpayer could not distinguish the type of metal sales made, the auditor took the approach most beneficial to the states.

In states that provide the taxpayer with an 85% dividend deduction, the revenue everywhere was revised to give recognition for the deduction.

In addition to the above adjustments, the revenue factor was computed to reflect combined reporting. The revenue of the subsidiaries was taken from their federal income tax returns, except for Federated Metals of Canada which was taken per books.

The taxpayer is engaged in mining activities in Idaho. At Wallace it operates the highly profitable silver and copper mines known as Galena. There are a number of other locations in the State that are either under exploration or in development work. The ores extracted from the mines are shipped to company-owned smelters.

There are no other company activities in the State.

This examination covers the years 1968-69-70. The State originally informed the auditor that the 1967 year was open for audit; but the taxpayer produced a closing agreement for the years 1965-66-67, a copy of which is forwarded with this report. The only item open for 1967 is the RAR changes, which the auditor has picked up for billing.

Adjustments to Income—Schedule I

A number of revisions that pertain only to the Idaho return are discussed in this section of the report. These adjustments were required for the years 1968-69-70.

1. Taxes based on or measured by income has been added back to income.

2. The following items were eliminated from income:

a. foreign dividend gross up

b. 50% of capital gains excess over capital losses

c. 85% dividend credit on qualifying dividends

No other adjustments were made to income.

APPORTIONMENT FACTORS—NUMERATORS—SCHEDULE II-F

Property Factor

The Idaho property required adjustment for all years examined.

The taxpayer reported average property at original cost and rents at 8 times. Figures were tested to property workpapers, rent analyses, and metal balance sheets; and the following adjustments were required:

1. During 1967 and into the early part of 1968, the taxpayer experienced a strike at all of its domestic facilities; therefore, ore concentrate that usually would have been sent from suppliers located in Idaho remained at the suppliers' sites. Title to the ore concentrate passed to the taxpayer, and the dollar value of the ore was carried on the books of taxpayer's East Helena plant located in Montana. This inventory, amounting to $8,212,868, was deducted from the Montana property because it was physically located in Idaho. But when reviewing the Idaho property workpapers, it became apparent that the taxpayer had failed to include the inventory among its Idaho properties. This adjustment to property was made for 1967.

2. Taxpayer omitted a small piece of mineral property, called the Triangle mine, from the numerator for 1969 and 1970. This was added back to the numerator by the examiner.

3. The taxpayer did not exclude construction in progress from the numerator for the years 1967 through 1970. This adjustment is being made for these years, and a detailed discussion of the basis used to determine property under construction is given in the property everywhere section of this report.

4. Rents for the years 1968-69-70 required adjustment. The taxpayer capitalized mine royalty payments as rents for states in which it either paid small mine royalties or none at all. The obvious result was a decrease in the property factor ratio. In the case of Idaho, where mine royalties are high, something occurred in the taxpayer's reasoning. Mine royalties underwent a change in character; they were no longer treated as rents subject to capitalization at 8 times. The taxpayer simply ignored these mine leases in both the denominator and numerator. The net effect, of course, was to keep the property as low as possible.

The auditor has included mine royalties as rents for both the denominator and numerator in recomputing the property factor.

Payroll Factor

Payroll was checked to payroll analyses by state, and no revision was required.

Revenue Factor

Revenue was checked to the federal return's consolidating workpapers which reflect revenues earned by plant site, and a significant revision was required.

The taxpayer reported sales made into Idaho by the Federated Metals Division and some by-product sales made through the New York office.

Mine sales which are treated as service revenue for federal income tax purposes were not reported as Idaho revenue. The reason is that these sales were made to a company smelter and, therefore, were intracompany in nature and should have been eliminated. However, the method used by the taxpayer to record the sale of primary metals is a margin basis. This method records the revenue at each phase of production and attributes revenue to the plant providing the service, such as extracting ore, smelting, and refining.

Since the taxpayer chose this method to record its income and does not have records showing sales of primary metals on a destination basis, the auditor has revised the Idaho revenue to include the total sales made from the Idaho mines. The taxpayer has agreed to this revision, even though it results in higher taxable revenue to Idaho. This revision was made for the years 1968-69-70.

Statement of Taxpayer's Representative

The taxpayer has informed the auditor that it will protest the following proposed revisions:

1. Combined reporting
2. Including as business income dividends, interest income, rents, royalties, and gains on the sale of securities

Auditor's Recommendation

It is recommended that notices of proposed assessments be issued to ASARCO for the years 1968-69-70 in accordance with schedules attached.

Form 41

Return with your remittance to State Tax Commission P. O. Box 36, Boise, Idaho 83707

IDAHO CORPORATION INCOME TAX RETURN

1969

or of. taxable year beginning _____, 1969
and ending _____, 19___

IMPORTANT—All applicable lines and schedules must be filled in. If the lines on the schedules are not sufficient, see instructions

Please type or print

Name: American Smelting and Refining Company

Number and Street: 120 Broadway

City or Town and State: New York, New York

ZIP Code No.: 10005

Federal Employer's No.: 13-4924440

Idaho Employer's Withholding No.: 14141-73-20-45 U

Kind of Business: Non-ferrous metals

Federal Business Code No.: 3330

Incorporated in State of: New Jersey Year: 1899

Consolidated Return: Yes (See Statement A

If desired, attach copy of Federal Return (Form 1120) and copies of all supporting schedules, enter on Line 30 the corresponding amount from Line 30 of the Federal Return, and omit Lines 1 through 29.

GROSS INCOME	1 Gross receipts or gross sales 360,020,649 Less: Returns and allowances	12,382,869	347,637,780
	2. Less: Cost of goods sold (Schedule A) and/or operations (attach schedule)		138,261,883
	3 Gross profit		209,375,897
	4 Dividends (Schedule C)		69,519,428
	5 Interest on obligations of the United States and U. S. instrumentalities		1,749,007
	6 Other interest		3,528,901
	7 Gross rents		62,385
	8 Gross royalties		940,244
	9 Net gains (losses)—(separate Schedule D)		2,523,815
	10 Other income (attach schedule) Schedule A-1 Attached		(1,073,958)
	11 TOTAL income—Add lines 3 through 10		286,625,719
DEDUCTIONS	12 Compensation of officers (Schedule E)		1,344,130
	13 Salaries and wages (not deducted elsewhere)		
	14 Repairs (do not include capital expenditures)		25,821,925
	15 Bad debts (Schedule F if reserve method is used)		14,909
	16 Rents		1,251,914
	17 Taxes (Schedule B or other schedule)		16,629,849
	18 Interest		2,545,091
	19 Contributions (attach schedule—see instructions for limitation)		446,335
	20 Casualty or theft losses (attach schedule)		
	21 Amortization (attach schedule)		26,828
	22 Depreciation (Schedule G)		12,418,044
	23 Depletion		11,130,708
	24 Advertising		989,912
	25 (a) Pension, profit-sharing, stock bonus, annuity plans (attach Form 2950)		6,640,538
	(b) Other employee benefit plans (see instructions)		6,436,854
	26 Other deductions (attach schedule) Schedule K Attached		106,469,864
	27 TOTAL deductions on lines 12 through 26		192,216,901
	28 Taxable income before net operating loss deduction and special deductions (line 11 less line 27)		94,408,818
	29 Less: (a) Net operating loss deduction (see instructions—attach schedule)		
	(b) Special deductions (attach schedule)	35,124,375	35,124,376
	30 Federal taxable income (line 28 less line 29). Enter also on line 31, page 3		59,284,442

COMPUTATION OF TAX DUE OR REFUND

1 Net taxable income (line 37, page 3) $ 419,876 @ 6% — tax due	25,192.56
2 Credit for estimated tax paid	13,000.00
Tax Due	12,192.56
Overpayment	
3 Permanent Building Fund Tax (Applies to all corporations except "Tax Option" Corporations)	$10.00
4 TOTAL	12,202.56

SIGNATURE AND VERIFICATION (See Instructions)

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

CORPORATE SEAL

October 13, 1970 (Date) — (Signature of Officer) — R.J.Plumb,Jr. Treasurer

(Date) — (Signature of Preparer — Individual or Firm) — (Address)

105a

SCHEDULE A.—COST OF GOODS SOLD

(Where inventories are an income-determining factor)

1 Inventory at beginning of year	
2 Merchandise bought for manufacture or sale	
3 Salaries and wages — Schedule A Attached	
4 Other costs per books (Attach schedule)	
5 TOTAL	
6 Less: Inventory at end of year	
7 Cost of goods sold (enter here and on line 2, page 1)	

SCHEDULE B.—TAXES

Explanation	Amount
Schedule B Attached	
TOTAL (enter here and on line 17, page 1)	

SCHEDULE C.—INCOME FROM DIVIDENDS

1. Name of Declaring Corporation	2. Domestic Corporations Taxable Under Chapter 1, Internal Revenue Code*	3. Certain Preferred Stock of Public Utilities Taxable Under Chapter 1, Internal Rev. Code	4. Foreign Corporations	5. Other Corporations
Schedule C Attached				
TOTALS				

Total of columns 2, 3, 4, and 5 (enter here and on line 4, page 1)

*Except (a) dividends on certain preferred stock of public utilities which should be entered in column 3, and (b) dividends which should be entered in column 5, received from Cuba Trade Act corporation, from corporations to which section 931 applies, and from corporations exempt from tax under sections 501 and 521.

SCHEDULE D.—USE SCHEDULE D (FORM 1120)

SCHEDULE E.—COMPENSATION OF OFFICERS

See instructions for page 2 in regard to compensation of non-resident officers and directors.

Name and Address of officer	1. Social Security Number	2. Official Title	3. Time Devoted to Business	4. Percent of Corporation stock owned Common	5. Preferred	6. Amount of Compensation	7. Expense Account and Allowances
Schedule E Attached							
Total compensation of officers (enter here and on line 12, page 1)							

SCHEDULE F.—BAD DEBTS

1. Year	2. Trade notes and accounts receivable outstanding at end of year	3. Sales on account	Amount added to reserve: 4. Current year's provision	5. Recoveries	6. Amount charged against reserve	7. Reserve for bad debts at end of year
1966		Schedule F Attached				
1967						
1968						
1969						

SCHEDULE G.—DEPRECIATION

1. Description of property	2. Date Acquired	3. Cost or Other Basis (Exclude Land)	4. Depreciation Allowed (or allowable) in Prior Years	5. Method of Computation	6. Rate (%) or Life (years)	7. Depreciation This Year
Total additional first-year depreciation (do not include in items below)						
Schedule G Attached						

(Detail to substantiate the deduction claimed must be shown on attached schedule)

1 Total	
2 Less Amount of depreciation claimed in Schedule A and elsewhere on return	
3 Balance (enter here and on line 22, page 1)	

COMPUTATION OF NET IDAHO TAXABLE INCOME

31	Amount from line 30, page 1	59,284,442
	Idaho Adjustments	
	Add:	
	(a) Interest and dividends received, tax-exempt under I R C	672,635
	(b) State income taxes deducted on page 1 (measured by income)	1,009,695
	(c) Net operating loss deduction, line 29a, page 1	
	(d) Dividends received credit included in line 29b, page 1	35,124,376
	Subtract:	
	(e) Dividend received credit Idaho qualifying corporations (attach detailed schedule)	
	(f) Tax-exempt income (attach detailed schedule)	
	(g) 50% capital gain excess over capital loss Schedule H Attached	1,261,903
	(h) Non-business Income allocated to all states including Idaho (attach detailed schedule)	72,465,161
32	Net Business Income subject to apportionment (line 31 plus lines 31a, b, c and d, minus e, f, g and h)	22,364,079
33	Times Idaho apportionment factor—from line 48 below 1.8664 %	
34	Net Business Income apportioned to Idaho (Amount on line 32 multiplied by percentage on line 33)	417,403
35	(a) Add Non-business income allocated to Idaho (attach detailed schedule) Schedule H Attached	2,473
	(b) Deduct Idaho net operating loss carry-over (attach detailed schedule)	
36		
37	Net Taxable Income (Amount on line 34 plus or minus amounts on lines 35 and 36)	419,876

APPORTIONMENT FACTORS

		Total	Other States	Idaho	Idaho Percent of Total
38	Inventory (average)	162,190,788	161,658,659	532,129	
39	Depreciable property at cost (average)				
40	Land at cost (average)	327,576,169	319,408,571	8,167,598	
41	Rents capitalized	9,919,664	9,502,723	416,936	
42	Total real and tangible personal property	499,604,621	490,569,953	9,114,663	1.8241%
43	Sales and other apportionable gross receipts	350,743,590	350,671,661	71,929	.020%
44	Compensation of officers	1,344,130	1,344,130		
45	Other payroll	90,773,241	87,314,652	3,458,589	
46	Total payroll	92,117,371	88,658,782	3,458,589	3.7545%
47	Total percent				5.5991%
48	Idaho apportionment factor (Average Percent)			1.8664%	

Amount of Idaho taxable income (or loss) for: 1966 1,404,255* 1967 491,791* 1968 None

Has the Federal Government determined your income tax liability to be different from that reported for any year? (Other than adjustments for years covered by federal audit actions which were previously submitted to the State) No If the answer is "yes", state the year or years involved and disclose whether the change in liability was made as a result of a federal audit or a change reflected on an amended return

Have you filed Idaho Form 96 and accompanying Forms 20 (or Federal Forms 1099) Yes (X) No ( )

Principal business activity Mining, smelting, refining, manufacturing, buying and selling

Principal product or service metalliferous products

Corporation books are in care of H. Q. Stringham, Comptroller

Name and address of Manager or Agent in Idaho Norman Visnes, Wallace, Idaho

Locations of properties and businesses in Idaho Wallace, Idaho

*As per compromise settlement with Tax Commissioner, September 15, 1970.

SCHEDULE L.—BALANCE SHEETS. (SEE INSTRUCTIONS)

ASSETS	Beginning of Taxable Year (A) Amount	Beginning of Taxable Year (B) Total	End of Taxable Year (C) Amount	End of Taxable Year (D) Total
1. Cash				
2. Notes and accounts receivable				
(a) Less: Reserve for bad debts				
3. Inventories				
4. Investments in Government obligations				
5. Other current assets (Attach schedule)				
6. Loans to stockholders				
7. Other investments (Attach schedule)				
8. Buildings and other fixed depreciable assets				
(a) Less: Accumulated amortization and depreciation				
9. Depletable assets				
(a) Less: Accumulated depletion				
10. Land (net of any amortization)				
11. Intangible assets (amortizable only)	Schedule L Attached			
(a) Less: Accumulated amortization				
12. Other assets (Attach schedule)				
13. Total assets				
LIABILITIES AND CAPITAL				
14. Accounts payable				
15. Mortgages, notes, and bonds payable in less than 1 year				
16. Other current liabilities (Attach schedule)				
17. Loans from stockholders				
18. Mortgages, notes, and bonds payable in 1 year or more				
19. Other liabilities (Attach schedule)				
20. Capital stock: (a) Preferred stock				
(b) Common stock				
21. Paid or capital surplus (attach reconciliation)				
22. Surplus reserve (Attach schedule)				
23. Earned surplus and undivided profits				
24. Total liabilities and capital				

SCHEDULE M-1.—RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN

1. Net income per books		7. Income recorded on books this year not included in this return (itemize)	
2. Federal income tax		Schedule M-1 Attached	
3. Excess of capital losses over capital gains			
4. Taxable income, not recorded on books this year (itemize)		8. Deductions in this tax return not charged against book income this year (itemize)	
5. Expenses recorded on books this year not deducted in this return (itemize)			
		9. Total of lines 7 and 8	
6. Total of lines 1 through 5		10. Income (line 28, page 1)—line 6 less 9	

SCHEDULE M-2.—ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS PER BOOKS (LINE 23, PAGE 4)

1. Balance at beginning of year		5. Distributions (a) Cash	
2. Net income per books		(b) Stock	
3. Other increases (itemize)		(c) Property	
		6. Other decreases (itemize)	
		Schedule M-2 Attached	
		7. Total of lines 5 and 6	
4. Total of lines 1, 2 and 3		8. Balance end of year (line 4 less 7)	

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Form 41 — IDAHO CORPORATION INCOME TAX RETURN — 1970

Return with your remittance to State Tax Commission P. O. Box 36, Boise, Idaho 83707

or other taxable year beginning _____, 1970
and ending _____, 19__

IMPORTANT—All applicable lines and schedules must be filled in. If the lines on the schedules are not sufficient, see instructions

Please type or print

Name: AMERICAN SMELTING AND REFINING COMPANY

Number and Street: 120 BROADWAY

City or Town and State: NEW YORK, NEW YORK — ZIP Code No.: 10005

Federal Employer's No.: 13-4924440
Idaho Employer's Withholding No.: 14141-73-20-45 U
Kind of Business: Non ferrous metals
Federal Business Code No.: 3330
Incorporated in State of: New Jersey Year: 1899
Consolidated Return: Yes — See Statement A

If desired, attach copy of Federal Return (Form 1120) and copies of all supporting schedules, enter on Line 30 the corresponding amount from the Federal Return, and omit Lines 1 through 29.

GROSS INCOME	1 Gross receipts or gross sales 353,783,675 Less: Returns and allowances	5,158,605	348,625,070
	2 Less: Cost of goods sold (Schedule A) and/or operations (attach schedule)		125,673,006
	3 Gross profit		222,952,064
	4 Dividends (Schedule C)		64,762,970
	5 Interest on obligations of the United States and U. S. instrumentalities		2,239,199
	6 Other interest		4,682,474
	7 Gross rents		61,905
	8 Gross royalties		1,169,110
	9 Net gains (losses)—(attach Federal Schedule D)		46,400,591
	10 Other income (attach schedule) Schedule A-1 attached		4,102,760
	11 TOTAL income—Add lines 3 through 10		346,371,073
DEDUCTIONS	12 Compensation of officers (Schedule E)		1,351,020
	13 Salaries and wages (not deducted elsewhere)		
	14 Repairs (do not include capital expenditures)		28,974,859
	15 Bad debts (Schedule F if reserve method is used)		30,523
	16 Rents		1,041,517
	17 Taxes (Schedule B or other schedule)		17,073,387
	18 Interest		1,298,984
	19 Contributions (attach schedule—see instructions for limitation)		121,900
	20 Casualty or theft losses (attach schedule)		
	21 Amortization (attach schedule)		35,584
	22 Depreciation (Schedule G)		12,046,797
	23 Depletion (attach schedule)		13,094,690
	24 Advertising		1,062,904
	25 (a) Pension, profit-sharing, stock bonus, annuity plans (attach Federal Form 2050)		6,547,688
	(b) Other employee benefit plans (see instructions)		7,251,033
	26 Other deductions (attach schedule) Schedule K Attached		136,689,199
	27 TOTAL deductions on lines 12 through 26		226,620,085
	28 Taxable income before net operating loss deduction and special deductions (line 11 less line 27)		119,750,988
	29 Less: (a) Net operating loss deduction (see instructions—attach schedule)		
	(b) Special deductions (attach schedule)	20,004,677	20,004,677
	30 Federal taxable income (line 28 less line 29). Enter also on line 31, page 3		99,746,311

COMPUTATION OF TAX DUE OR REFUND

1. Net taxable income (line 37, page 3) $ 127,755 @ 6% — tax due	7,665.30
2. Permanent Building Fund Tax (Applies to all corporations except "Tax Option" Corporations)	$10.00
3 Credit for estimated tax paid	8,000.00
4 ~~Amount due~~ or Overpayment	(324.70)
5 Interest from Due Date @ 6% _____ Penalty if applicable _____	
6 TOTAL REMITTANCE	NONE

SIGNATURE AND VERIFICATION (See Instructions)

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

October 13, 1971 — (Date) — RJ Plumb,Jr. — (Signature of Officer) — Treasurer — (Title)

CORPORATE SEAL

(Date) — (Signature of Preparer — Individual or Firm) — (Address)

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File this return on or before the 15th day of the fourth month after the close of the taxable year.

SCHEDULE A.—COST OF GOODS SOLD

(Where inventories are an income-determining factor)

1 Inventory at beginning of year	
2 Merchandise bought for manufacture or sale	
3 Salaries and wages **Schedule A Attached**	
4 Other costs per books (Attach schedule)	
5 TOTAL	
6 Less: Inventory at end of year	
7 Cost of goods sold (enter here and on line 2, page 1)	

SCHEDULE B.—TAXES

Explanation	Amount
Schedule B Attached	
TOTAL (enter here and on line 17, page 1)	

SCHEDULE C.—INCOME FROM DIVIDENDS

1. Name of Declaring Corporation	2. Domestic Corporations Taxable Under Chapter 1, Internal Revenue Code*	3. Certain Preferred Stock of Public Utilities Taxable Under Chapter 1, Internal Rev. Code	4. Foreign Corporations	5. Other Corporations
Schedule C Attached				
TOTALS				

Total of columns 2, 3, 4, and 5 (enter here and on line 4, page 1)

*Except (a) dividends on certain preferred stock of public utilities, which should be entered in column 3, and (b) dividends, which should be entered in column 5, received from China Trade Act corporation, from corporations to which section 931 applies, and from corporations exempt from tax under sections 501 and 521, Internal Revenue Code

SCHEDULE D.—USE FEDERAL SCHEDULE D (FORM 1120)

SCHEDULE E.—COMPENSATION OF OFFICERS

See instructions for page 2 in regard to compensation of non-resident officers and directors.

Name and Address of officer	1. Social Security Number	2. Official Title	3. Time Devoted to Business	Percent of Corporation Stock Owned 4. Common	5. Preferred	6. Amount of Compensation	7. Expense Account and Allowances
Schedule E Attached							
Total compensation of officers (enter here and on line 12, page 1)							

SCHEDULE F.—BAD DEBTS

1. Year	2. Trade notes and accounts receivable outstanding at end of year	3. Sales on account	Amount added to reserve 4. Current year's provision	5. Recoveries	6. Amount charged against reserve	7. Reserve for bad debts at end of year
1967						
1968		**Schedule F Attached**				
1969						
1970						

SCHEDULE G.—DEPRECIATION

1. Description of property	2. Date Acquired	3. Cost or Other Basis (Exclude Land)	4. Depreciation Allowed (or allowable) in Prior Years	5. Method of Computation	6. Rate (%) or Life (years)	7. Depreciation This Year
Total additional first-year depreciation (do not include in items below) ▶						
Schedule G Attached						

(Detail to substantiate the deduction claimed must be shown on attached schedule)

1 Total	
2 Less Amount of depreciation claimed in Schedule A and elsewhere on return	
3 Balance (enter here and on line 22, page 1)	

COMPUTATION OF NET IDAHO TAXABLE INCOME

31 Amount from line 30, page 1		99,746,311
Idaho Adjustments		
Add:		
(a) Interest and dividends received, tax-exempt and [illegible] Code (measured by income)		111,023
(b) State income taxes deducted on page 1		1,032,701
(c) Net operating loss deduction, line 29a, page 1		20,004,677
(d) Dividends received credit included in line 29b, page 1		
(e) Salaries of non-resident officers not deductible		
(f)		
Subtract:		
(g) Dividends received credit: Idaho qualifying corporations (attach detailed schedule)		
(h) Tax-exempt income (attach detailed schedule)		23,200,296
(i) 50% capital gain excess over capital loss	Schedule H	90,666,299
(j) Nonbusiness Income allocated to all states including Idaho (attach detailed schedule)		
(k)		7,028,117
32 Net Business Income subject to apportionment (line 31 plus [illegible] b, c, d, e & f, minus g, h, i, j & k)		
33 Times Idaho apportionment factor—from line 59 below 1.8053 %		126,879
34 Net Business Income apportioned to Idaho (Amount on line 32 multiplied [illegible] Schedule H Attached		876
35 (a) Add Nonbusiness income allocated to Idaho (attach detailed schedule)		
(b) Deduct Idaho net operating loss carry-over (attach detailed schedule)		
36		127,755
37 Net Taxable Income (Amount on line 34 plus or minus amounts on lines 35 and 36)		

APPORTIONMENT FACTORS

	Total	Other States (Attach Schedule)	Idaho	Idaho Percent of Total
PROPERTY	194,620,198	194,082,543	537,653	
38 Inventory (average)				
39 Depreciable property at cost (average)	361,279,785	350,422,455	10,857,330	
40 Land at cost (average)				
41 Rents capitalized	7,968,992	7,720,000	248,992	
42 Total property	563,868,975	552,225,000	11,643,957	2.0650
SALES (Gross Receipts)				
43 Gross Sales, Less Returns and Allowances	351,510,387	351,333,267	177,120	
44 Dividends				
45 Interest on obligations of U.S.				
46 Other interest				
47 Gross rents received				
48 Gross royalties				
49 Net Gains (Losses) Schedule D				
50 Other income				
51 Total Income				
PAYROLL				
52 Compensation of officers	1,351,020	1,351,020		
53 From line 13, page 1				
54 From schedule A, line 3				
55 Included in line 14, page 1				
56 Other wages and salaries	96,761,221	93,523,147	3,238,074	
57 Total payroll	98,112,241	94,874,167	3,238,074	3.3004
58 Total percent				5.4159
59 Idaho apportionment factor (Average Percent)				1.8053

Has the Federal Government determined your income tax liability to be different from that reported for any year? Yes ( ) No (X)
If the answer is yes, submit under separate cover any Revenue Agent's Reports and schedules or copies thereof, showing final determination of any deficiency or over-assessment in Federal Tax not previously submitted.

Have you filed Idaho Form [illegible] and corresponding Forms 20 (or Federal Forms 1099) Yes (X) No ( )
Principal business activity mining, smelting, refining, mfg., buying & selling Principal product or service metalliferous products and coal.
Corporation books and records are in care of W.O. Springham Name and address of Manager or Agent in Idaho F.D. Owsley, Wallace, Idaho
Locations of properties and businesses in Idaho Wallace, Idaho

491,791*	NONE	419,876	

Amount of Idaho taxable income (or loss) for 1963 1965 1966

*Per Compromise Settlement with Tax Commission - September 15, 1970.

SCHEDULE L.—BALANCE SHEETS. (SEE INSTRUCTIONS)

ASSETS	Beginning of Taxable Year (A) Amount	Beginning of Taxable Year (B) Total	End of Taxable Year (C) Amount	End of Taxable Year (D) Total
1. Cash				
2. Notes and accounts receivable				
(a) Less: Reserve for bad debts				
3. Inventories				
4. Investments in Government obligations				
5. Other current assets (Attach schedule)				
6. Loans to stockholders				
7. Other investments (Attach schedule)				
8. Buildings and other fixed depreciable assets				
(a) Less Accumulated amortization and depreciation				
9. Depletable assets				
(a) Less Accumulated depletion				
10. Land (net of any amortization)				
11. Intangible assets (amortizable only)				
(a) Less: Accumulated amortization		SCHEDULE L ATTACHED		
12. Other assets (Attach schedule)				
13. Total assets				
LIABILITIES AND CAPITAL				
14. Accounts payable				
15. Mortgages, notes, and bonds payable in less than 1 year				
16. Other current liabilities (Attach schedule)				
17. Loans from stockholders				
18. Mortgages, notes, and bonds payable in 1 year or more				
19. Other liabilities (Attach schedule)				
20. Capital stock: (a) Preferred stock				
(b) Common stock				
21. Paid or capital surplus (attach reconciliation)				
22. Surplus reserve (Attach schedule)				
23. Earned surplus and undivided profits				
24. Total liabilities and capital				

SCHEDULE M-1.—RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN

1. Net income per books		7. Income recorded on books this year not included in this return (itemize)	
2. Federal income tax			
3. Excess of capital losses over capital gains			
4. Taxable income, not recorded on books this year (itemize)		8. Deductions in this tax return not charged against book income this year (itemize)	
5. Expenses recorded on books this year not deducted in this return (itemize)		SCHEDULE M-1 ATTACHED	
		9. Total of lines 7 and 8	
6. Total of lines 1 through 5		10. Income (line 28, page 1) line 6 less line 9	

SCHEDULE M-2.—ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS PER BOOKS (LINE 23, PAGE 4)

1. Balance at beginning of year		5. Distributions: (a) Cash	
2. Net income per books		(b) Stock	
3. Other increases (itemize)		(c) Property	
		6. Other decreases (itemize)	
		SCHEDULE M-2 ATTACHED	
		7. Total of lines 5 and 6	
4. Total of lines 1, 2 and 3		8. Balance end of year (line 4 less 7)	

TRANSCRIPT OF PROCEEDINGS IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF IDAHO
Case No. 53182

[p. 5]

* * * * * * * * * *

DIRECT EXAMINATION

BY MR. PETERSON:

Q. Would you state your name for the record, Mr. Stringham?

A. Homer Q. Stringham.

* * * * * * * * * *

Q. Your employment?

A. Vice-President and Comptroller, American Smelting and Refining Company.

* * * * * * * * * *

[p. 55] Q. (By Mr. Petersen) Now, Mr. Stringham, let's turn to Southern Peru. Where does it operate?

A. Southern Peru operates in Peru.

Q. And it is I believe 51.5% of the stock in that corporation is owned by ASARCO?

A. Yes.

Q. This is a majority of the stock. Does ASARCO control Southern Peru in any sense of that term?

A. No.

Q. Now, why not?

A. The by-laws of the company are structured to prevent this by specifying that ASARCO is entitled to elect six directors and each of the other shareholders, the other three are authorized to elect two each making a total of 12 directors. These 12 directors in turn select a 13th director. These by-laws also provide that eight votes are required to pass any resolution.

Q. That means then that ASARCO which has six directors would have to get the concurrence of two other di-

rectors to [p. 56] effectively pass any decision or make any decision?

A. Yes.

Q. Is the executive—they have an executive committee do they not?

A. Yes, there is an executive committee of the Board which is constituted and functions in exactly the same manner.

Q. It's structured with the same pattern?

A. Right.

Q. So that ASARCO cannot control the acts of the executive committee either?

A. That is right. It also needs one other shareholder.

Q. Now, can the Articles and By-Laws of the corporation be changed?

A. Only by the unanimous consent of all parties, all the shareholders. The stock certificates are actually engraved with this restriction thereon.

Q. Essentially then this is the result of a contractual agreement between ASARCO and three other shareholders of the corporation, is that correct?

A. That is correct.

Q. And it would require unanimous agreement of the two other parties to the contract to get any changes made?

A. Correct.

Q. Does Southern Peru have employees?

A. Yes.

[p. 57] Q. A great number?

A. Yes.

Q. And does it have its staff?

A. Yes.

Q. That staff that you'd expect a major company to have?

A. Yes.

Q. What does Southern Peru do?
A. Southern Peru mines, mills and smelts copper bearing materials in Peru.

Q. What is the product which is produced by this process?
A. It produces blister copper.

Q. Blister copper.
A. From its smelter.

Q. Is blister copper a commercial product?
A. Yes.

Q. Does ASARCO render any services to Southern Peru?
A. Yes.

Q. What are those services?
A. ASARCO has a contract or has contracts with Southern Peru to provide purchasing service outside of Peru, traffic service for their exports and imports outside of Peru, and for their tax work outside of Peru.

Q. Preparation of the United States Tax Return?
A. Yes, sir.

[p. 58] Q. Does Southern Peru have its own purchasing department?
A. In Peru.

Q. Does it have its own Tax Department?
A. In Peru.

Q. Does it have its own Traffic Department?
A. In Peru.

Q. Is ASARCO paid for the services it renders?
A. Yes.

Q. And can you describe to the court the agreement for payment for purchasing that is done by ASARCO? By the

way, this purchasing maybe channeled by ASARCO to ASARCO Mercantile, is that correct?

A. That is correct.

Q. Could you describe to the court then the contract for purchasing?

A. The purchasing contract provides payment for this service on the basis of a fixed fee plus a commission or percentage based on the amount of dollar volume of purchases.

Q. And what about the tax services?

A. That is negotiated fair fee for the work done.

Q. In other words, it is fixed fee fair value, is that correct?

A. It is a negotiated fixed fee, negotiated annually.

Q. And what about the compensation for traffic?

A. The same. The same as the tax fee, that is a fixed negotiated fee.

[p. 59] Q. You mean the same type of a fee?

A. The same type of fee, yes.

Q. It is a separate fee?

A. A seperate fee and in a different amount, yes.

Q. Does Southern Peru use any trade names or trade marks of ASARCO?

A. No.

Q. Does it identify itself with ASARCO in any way?

A. No.

Q. Does Southern Peru management seek direction or approval from ASARCO on major decisions?

A. No.

Q. Now, Southern Peru makes no purchases from ASARCO from the stipulation, but ASARCO makes substantial purchases from Southern Peru, can you explain why?

A. Southern Peru is contracted for the sale of its blister copper production to customers in Europe and with the shareholding company.

Q. Now, you have a long term output contract with Southern Peru, is that correct?

A. That is correct.

Q. And that is a contractual agreement?

A. Right.

Q. How is the price established?

A. It's based on a published quotation specified in the [p. 60] contract.

Q. Do you happen to know what that is?

A. Yes. That is the Average Metals Week Atlantic Seaboard Quotation as published in Metals Week. That is a trade publication.

Q. Can you explain what that quotation is; how does the magazine make the quotation?

A. This trade publication collects statistics and prices from the industry and publishes them. These average prices are based on reported sales by the various companies selling copper. The trade paper computes the averages and publishes them.

Q. Then all of the producers and sellers of copper will furnish the information on sales to this magazine. Is that confidential or what?

A. Perhaps not all of them, but most of the substantial ones, and enough of them to make this representative. And this information is handled confidentially by the publication so that no individual knows the components of the computation or the data fed in there.

Q. And therefore what is published is the average price paid by buyers to sellers during the period?

A. Right.

Q. And that is the quotation to which you are making reference?

[p. 61] A. That is the quotation specified in the contract, yes.

Q. And therefore the selling price for the blister copper will be determined—what is it, month by month or week by week? How often is that quotation published?

A. Well, the trade publication is published weekly, but it will have weekly averages, monthly averages. I'm not sure, but I think the Southern Peru contract is based on a monthly average.

Q. It is a monthly average isn't it?

A. I think so.

Q. And therefore the parties have no control over this price?

A. No.

Q. It's determined by the figures that appear in the trade publication?

A. Right.

Q. And does ASARCO have output contracts with other companies in which it has no interest?

A. Oh, yes.

Q. A great many of these?

A. Many, yes.

Q. Is the same method used to establish price on other contracts?

A. With a few rare exceptions where spot price might be used, the vast majority are all based average quotations or average market quotations published some place.

[p. 62] Q. And these are your long term output contracts with companies in which you have no interest?

A. That is right.

Q. And is the same price, and I say the same price, I mean this Average Metals Weekly Atlantic Seaboard Quotation Price used in other contracts——

A. Yes, sir.

Q. That is output contracts?

A. Yes, sir. The same as used in other contracts, yes.

Q. Companies in which ASARCO has no interest?

A. That is right.

Q. The same price?

A. The same average.

Q. Right.

A. The same average price.

Q. And ASARCO generally uses this method in pricing their output contracts?

A. That is right.

Q. Is this method used or is it common in the industry?

A. No.

Q. ASARCO is one of the few companies that uses it?

A. This is used primarily because ASARCO is a custom smelter and is buying material from outside its mines and its own mines.

Q. So essentially ASARCO is one of—maybe the only [p. 63] company that uses this pricing method?

A. No, not the only one.

Q. Some others?

A. Any company buying material from mines, and there are other companies which do this, would use this same—generally use this same technique.

Q. Is Southern Peru integral to ASARCO?

A. No.

Q. Is Southern Peru necessary to ASARCO?

A. No.

Q. Is the output contract necessary? Is it important?
A. It is important. It is not necessary.

Q. If you lost the output contract could it be replaced?
A. Probably.

Q. Within a short time?
A. Yes.

Q. Isn't it a fact that because of your custom smelting position you would likely get that blister copper in any event?
A. It is likely, yes.

Q. Whether you had any output contract with Southern Peru or not?
A. Right.

Q. It would come to you because of your position as a custom smelter?
A. Right.

[p. 64] Q. What would happen if ASARCO lost its investment in Southern Peru?
A. Well, it would lose the dividends from the company.

Q. It wouldn't lose the output contract?
A. No.

Q. Did ASARCO operate independently?
A. You mean——

Q. Did—I'm sorry, Your Honor. Did Southern Peru operate independently?
A. Yes.

• • • • • • • • • • •

[p. 65] Q. Let's turn now, Mr. Stringham, to ASARCO Mexicana. That corporation is 49% owned by ASARCO, is that correct?
A. That is correct.

Q. And where does it operate?
A. In Mexico.

Q. How is the rest of the stock of ASARCO Mexicana held?
A. The rest of the stock is held by Mexican Nationals.

Q. Is it publicly held?
A. Yes.

Q. What is the stock structure? The stock structure, if I'm not mistaken, ASARCO has Class B stock, the Nationals have Class A stock and that is publicly held.
A. Right.

Q. And the Class B stock represents 49% of the interest in ASARCO Mexicana?
A. That is right. Class A can only be held by Mexicana Nationals.

Q. Now, does ASARCO Mexicana use any trade marks or trade names of ASARCO?
A. Yes.

[p. 66] Q. As a matter of fact ASARCO is in the name of the corporation?
A. Right.

Q. And that's the trade name, is it not?
A. Right.

Q. Is that because at one time ASARCO owned a 100% of this company?
A. That is correct.

Q. And you had to divest yourself of that ownership, the 100%?
A. 51%.

Q. Right. And that happened a long time ago, '65 or——
A. '65 I believe it was.

Q. And the reason for that or I suppose the divestiture was in fact the effect of the tax and land laws in Mexico, is that not true?

A. That is right.

Q. And so ASARCO was essentially compelled to divest itself of this ownership?

A. Right.

Q. Does ASARCO perform any services for ASARCO Mexicana.

A. Yes.

Q. And is paid to charge for this service?

A. It is.

Q. Does management of ASARCO Mexicana seek direction or [p. 67] approval from ASARCO on major decisions?

A. No.

Q. Is ASARCO Mexicana an integral part of ASARCO?

A. No.

Q. Is this company necessary to ASARCO?

A. No.

Q. What would the effect of loss of the company be?

A. Loss of dividend income.

Q. Now, I notice in the stipulation, and this is on the second page of this stipulation, that ASARCO—no, it's not the second page—it's back further in I guess Chart C, D and E, I notice that ASARCO Mexicana though it makes no purchases or that ASARCO makes no purchases from ASARCO Mexicana that ASARCO does act as a commission agent for United States sales, is that correct?

A. That's what the chart says as I recall it, yes.

Q. And is that true?

A. In part. ASARCO does make direct purchases of—some direct purchases from ASARCO Mexicana in addition to acting as sales agent.

Q. I think there are a couple of corrections of that type that we will add, Mr. Stringham. There is an oversight there. There are some spot sales of concentrates that were made during that period, is that right?

A. That is right.

[p. 68] Q. But you do have a purchase contract with ASARCO by which you are paid commissions for purchases made by ASARCO Mexicana in the United States?

A. Will you repeat that question?

Q. You do have a contract with ASARCO Mexicana by which you make sales of what, metals?

A. Lead and zinc.

Q. Lead and zinc for ASARCO in the United States?

A. For ASARCO Mex.

Q. Sorry, I do get those . . . For ASARCO Mexicana in the United States, is that correct?

A. Yes, and abroad.

Q. And abroad. And ASARCO is paid a commission by ASARCO Mexicana for making those sales, is that correct?

A. That is correct.

Q. And that is pursuant to contract?

A. Yes, formal contract.

Q. So that contract would continue even though you lost your investment in ASARCO Mexicana?

A. Right. Now, also the purchase contract or some products which we buy directly.

Q. Did ASARCO Mexicana operate independently?

A. Yes.

Q. Is ASARCO Mexicana an integral to ASARCO?

A. No.

[p. 69] Q. Is it necessary to ASARCO?

A. No.

Q. Does ASARCO Mexicana management seek direction or approval from ASARCO on major decisions?

A. No.

Q. Now I might, again, simply in the sake of simplicity mention that Mexicana de Cobre is a corporation owned by ASARCO Mexicana, is that not correct? Or was a corporation owned by——

A. Yes, it is partially owned.

Q. 49%, was owned by ASARCO Mexicana——

A. Right.

Q. ——the rest of it was publicly held?

A. Public and also I think the government had an interest.

Q. So that essentially, whatever part of it this applied to, that part was owned by ASARCO Mexicana?

A. Right.

Q. Now, let's go to M.I.M. Holding, Mount Isa. Where does it operate?

A. In Australia and England.

Q. And ASARCO owns 52% of that company?

A. Right.

Q. ASARCO has no officers or directors of M.I.M. and yet it has a majority of the stock, why is that so?

[p. 70] A. This company has been very successful in staffing the corporation with Australian people and it's been able to run this company by themselves and, therefore, in consequence of the nationalistic feeling which developes in most of such developing countries we have not exercised any right we might have to elect a director to to the board of the company.

Q. This investment in that sense needs no stewardship from ASARCO, is that correct?

A. That is right.

Q. And it's in the best interest of ASARCO in that sense to keep away from and ignore the company?

A. Right.

Q. How is the rest of the stock of M.I.M. Holdings held?

A. It is widely held mostly in Great Britain, United States and Australia.

Q. This is a major corporation with a large staff and many employees?

A. That is right.

Q. Hundreds of employees?

A. Thousands.

Q. Thousands of employees. I notice there are practically no purchases by or from ASARCO?

A. That is right.

Q. Does M.I.M. use any ASARCO trade names or trade marks?

A. No.

[p. 71] Q. Does it identify itself with ASARCO in any way?

A. No.

Q. Does it use any ASARCO patents?

A. Yes.

Q. And that's a furnace patent?

A. It's a melting furnace patent.

Q. And does it pay for this?

A. Yes.

Q. And the price that is paid for this patent the same that would be paid by any other company using it?

A. That is right.

Q. In fact ASARCO has about a million dollars a year in royalties from patents if I remember correctly?

A. That is right.

Q. And the amounts of royalties that are paid by M.I.M. are set out in the stipulation, Your Honor. I think there is $30,000.00 a year or something like that.

Does ASARCO render any services to M.I.M.?
A. Occasionally.

Q. What kind of services?
A. It would be requests from Mount Isa for technical services of an engineer or assistant man or something like that.

Q. Do they pay for this?
A. Yes.

Q. But there isn't any contract?
[p. 72] A. No.

Q. Essentially then M.I.M. pays for any services that it requests. These requests are on a call basis?
A. Right.

Q. There is no legal commitment to supply them?
A. No.

Q. Does M.I.M. seek approval or direction from ASARCO in making major decisions?
A. No.

Q. Is M.I.M. an integral part of ASARCO?
A. No.

Q. Is M.I.M. necessary to ASARCO?
A. No.

Q. And what would the effect of loss of M.I.M. be upon ASARCO?
A. Loss of the dividend income.

Q. Did it operate independently?
A. Yes, sir.

Q. What does ASARCO—what does M.I.M. do Mr. Stringham, what is its operation?

A. M.I.M. operates a mine in Queen Land's Australia. This is a lead-zinc, ore and copper ore which is smelted in a copper smelter and a lead smelter at the mine site. It also produces at mine site zinc concentrates which are sold in that form. The copper blister from the smelter is refined at their [p. 73] refinery at Townsville, Australia in Queens Land. The lead bullion is refined at their lead refinery near London, England.

Q. So that essentially M.I.M. is involved in mining and smelting and refining?
A. Right.

Q. Now, I'd like to turn to General Cable and Revere Copper, and I think we put the two of these companies together for this purpose.
A. Right.

Q. They both operate in the United States?
A. Yes.

Q. And ASARCO has approximately 34% ownership in each of these?
A. Right.

Q. How is the rest of the stock held?
A. It is widely held.

Q. Sold on the——
A. Yes,——

Q. ——exchange?
A. ——it is listed on the New York Stock Exchange, yes.

Q. And I suppose it has many employees and staff just as any major corporation would?
A. Right.

Q. ASARCO has no one on the Board of Directors and no one in management, is that correct?
[p. 74] A. That is right.

Q. Does General Cable or does Revere Copper use any trade marks or trade names of ASARCO?

A. I believe Revere has one minor——

Q. Well, now are you talking about trade marks?

A. Wait, wait, no. The answer to that question is no. I was thinking of patents.

Q. So that they don't use any trade marks or trade names?

A. That's correct, they do not.

Q. But you were going to say they have a patent?

A. I think Revere licenses one patent.

MR. PETERSEN: I think, Your Honor, that the stipulation recites that. There is about $4,000.00 a year in patent royalties that are paid.

Q. (By Mr. Petersen) Is that a fair price?

A. Oh, yes.

Q. Does either General Cable or Revere Copper identify themselves in any way with ASARCO——

A. No.

Q. ——in advertising?

A. No.

Q. Does ASARCO render any services to either of these companies?

A. One small service.

[p. 75] Q. What is that?

A. They use our Stock Transfer Department.

Q. And are they charged for that?

A. Oh, yes.

Q. Are either of these companies integral to ASARCO?

A. No.

Q. Are either of them necessary to ASARCO?

A. No .

Q. Does management of either of these corporations seek direction or approval from ASARCO on major decisions?

A. No.

Q. They do have or make significant purchases from ASARCO, is that not correct?

A. That is correct.

Q. And these purchases are listed in the stipulation, Your Honor.

Do these companies have other suppliers?

A. Oh, yes.

Q. ASARCO divested itself of Cable in 1970, didn't it?

A. Yes.

Q. Has there been any significant change in the sales pattern from that date, that is after 1970?

A. No.

Q. What would the effect of loss of either of these companies be upon ASARCO?

[p. 76] A. Loss of dividend income.

Q. You've already experienced that with Cable?

A. Yes.

Q. Did they operate independently?

A. Yes.

* * * * * * * * * *

SUPREME COURT OF THE UNITED STATES

No. 80-2015

ASARCO INCORPORATED, ETC., *Appellant*,

v.

IDAHO STATE TAX COMMISSION

Supreme Court No. 12198

APPEAL from the Supreme Court of Idaho.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. The case is set for oral argument in tandem with case No. 80-1745, *F. W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico.*

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No. 80-2015

In The

Supreme Court of the United States

October Term, 1980

ASARCO INCORPORATED (formerly The American Smelting and Refining Company),

Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OR AFFIRM

THEODORE V. SPANGLER, JR.
Deputy Attorney General
State of Idaho

P. O. Box 36
Boise, Idaho 83722

Counsel for Appellee

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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October Term, 1980

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IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Idaho Supreme Court on the grounds that the questions presented are so unsubstantial as not to need further argument or, alternatively, that the decision of the Idaho Supreme Court is not a final judgment.

I.

Idaho's inclusion of certain dividends, interest and capital gains in apportionable income complies with the "unitary business" test laid down by this court in Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U. S. 425, 100 S. Ct. 1223 (1980).

ASARCO's jurisdictional statement begins with a declaration of the questions presented which presumes a determination different from that actually made by the Idaho Supreme Court. In its statement of the first question presented, ASARCO alleges that the Idaho Supreme Court has erroneously included in apportionable business income "dividends paid to Appellant by functionally independent subsidiaries." [J.S. p. i] This characterization seriously misconstrues the Idaho Supreme Court's ruling. That Court determined that ASARCO had failed to prove that the dividends, interest and capital gains in question were earned from activities separate and distinct from its mining, smelting, refining and selling activities. [App. pp. 22a, 24a and 25a] It is important to note that where the Idaho Court found that ASARCO had established that income received from other dividend-paying subsidiaries was truly "separate and unrelated to ASARCO's general mining and smelting business" the dividends were classified as nonbusiness income, none of which could be attributable to Idaho by apportionment. [App. p. 23a]

But in regard to income about which ASARCO seeks review, the Idaho Court said:

> The clear inference from these facts is that ASARCO's interest in these companies was not merely that of

> a passive investor but that this dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral and necessary part of its mining and smelting business. [App. p. 22a]

An accurate understanding of the Idaho Court's decision in this regard is important. The Idaho Court concluded that the dividends, interest and capital gains in question were apportionable precisely because they were earned as an integral and necessary part of its mining and smelting business. Clearly, the Idaho Court did not—as ASARCO alleges—require apportionment of dividends paid by functionally independent or unrelated subsidiaries.

This Court should not be mislead by ASARCO's selective recitation of facts from the record. The factual record upon which the Idaho Court based its conclusion is clear. The Court's recital of the facts [App. pp. 5a through 12a] and its holding [App. pp. 19a through 26a] amply reflect the factual basis for concluding the income challenged by ASARCO is in reality income integrally related to its business activities in Idaho. Additionally, the Idaho Supreme Court is not alone in this conclusion. The Montana Supreme Court reached the same conclusion in regard to the same taxpayer for the same taxable periods. See *Montana Department of Revenue v. American Smelting and Refining Co.*, 567 P. 2d 901 (Mont., 1977), appeal dismissed, 434 U. S. 1042 (1978).

It is apparent that ASARCO's real disagreement with the Idaho Court's ruling is the Idaho Court's conclusion that it had failed to prove by clear and convincing evidence that the dividends, interest and capital gains in question

were what ASARCO alleges them to be, that is, non-unitary income.

Idaho's requirement that a taxpayer prove by clear and convincing evidence that its dividends, interest and gains are not part of its unitary business [*Idaho Code* § 63-3027(a)(1), at App. p. 67a] is appropriate. This Court has held that a taxpayer who attacks an apportionment formula carries a distinct burden of showing by "clear and cogent evidence" that it results in extraterritorial values being taxed. See *Butler Brothers v. McColgan*, 315 U. S. 501 (1942).

Additionally, ASARCO would seek to have this Court construe the "unitary business" test established in *Mobil Oil Co. v. Commissioner of Taxes of Vermont*, 445 U. S. 425, 100 S. Ct. 1223 (1980) so narrowly as to virtually negate the effect of that ruling. However, this Court has already explained the unitary business test in *Exxon Corp. v. Wisconsin Depart. of Revenue*, 447 U. S. 207, 100 S. Ct. 2109 (1980). *Exxon* answers the question ASARCO proposes this Court must review and answers it contrarily to ASARCO's position. ASARCO relies on the following language from *Mobil:*

> So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.

But the key language in *Mobil* is the statement:

> As these cases indicate, the linchpin of apportionability in the field of state income taxation is the uni-

> tary business principle. *In accordance with this principle, what appellant must show,* in order to establish that its dividend income is not subject to an apportioned tax in Vermont, *is that the income was earned in the course of activities unrelated to the sale of petroleum products in that state.* [Footnote omitted; Emphasis added; 100 S. Ct. 1223 at 1232]

In *Exxon,* supra, this Court explained this language as follows:

> The "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary business principle." Mobil Oil Corp. v. Commissioner of Taxes, supra, at ——, 100 S. Ct. at 1232. If a company is a unitary business, then a State may apply an apportionment formula to the taxpayer's total income in order to obtain a "rough approximation" of the corporate income that is "reasonably related to the activities conducted within the taxing State." Moorman Mfg. Co. v. Bair, 437 U. S., at 273. See also Underwood Typewriter Co. v. Chamberlain, 254 U. S., at 120. In order to exclude certain income from the apportionment formula, the company must prove that "the income was earned in the course of activities unrelated to the sale of petroleum products in that State." Mobil Oil Corp. v. Commissioner of Taxes, supra, at ——, 100 S. Ct. at 1232. The court looks to the "underlying economic realities of a unitary business," and the income must derive from "unrelated business activity" which constitutes a "discrete business enterprise," *Id.,* at ——, 100 S. Ct. at 1233. We agree with the Wisconsin Supreme Court that Exxon is such a unitary business and that Exxon has not carried its burden of showing that its functional departments are "discrete business enterprises" whose income is beyond the apportionment statute of the State. While Exxon may treat its operational departments as independent profit centers, it is nonetheless true that this case involves a highly integrated business which benefits from an umbrella of centralized management and controlled interaction.

Accordingly, this Court sustained Wisconsin's inclusion of all Exxon's functional departments as part of its unitary business subject to apportionment. These functional departments included exploration and production, refining, marketing, marine, coal and shale oil, minerals and land management. Only Exxon's marketing division conducted business in Wisconsin.

The important aspect of the *Exxon* holding to this case is that this Court applied the same unitary principle used in *Mobil* to Exxon's own business activities. The relevant unitary business connections were found to exist internally within Exxon Corporation's own activities.

The same internal unitary business exists with ASARCO. The issue is *not*—as ASARCO would have it—whether or not unitary connections exist between the payor corporations and the payee corporation but whether or not the intangible assets (represented by shares of stock or evidences of debt) are held and managed by ASARCO as part of its own overall unitary business a part of which is conducted in Idaho. As the *Exxon* holding clearly demonstrates, it is the taxpayer's own unitary business which provides the "underlying activity" or the "functionally integrated enterprise" necessary to apportion the income.

There is no constitutionally significant difference between this case and the *Exxon* case. In *Exxon* the taxpayer engaged in activities outside the taxing state which were different from those conducted in the state. As noted above, these included production, refining, marine, coal and shale oil, minerals and land management. However, the activities conducted outside the state were sufficiently related to the activities conducted within the state to justify the conclusion that all of the activities were

part of the taxpayer's unitary business, and that the income from all of these activities should be apportioned. Here, one of ASARCO's activities, conducted outside Idaho, is the acquisition, management and sale of certain intangible assets resulting in income in the form of dividends, interest and capital gains. The Idaho Court has similarly concluded that these activities are sufficiently related to ASARCO's other business activities, a part of which are conducted in Idaho, to make them part of ASARCO's unitary business and to justify apportionment of that income. The record supports that conclusion.

To subject dividends, interest or capital gains earned from securities issued by foreign corporations does not, of course, amount to taxation of the foreign corporations. A shareholder is a taxable entity entirely separate from the corporation issuing the shares. *Moline Properties, Inc. v. Commissioner,* 319 U. S. 436 (1973). The dividends are ASARCO's own income. That is why the relevant "underlying activity" is ASARCO's own activity—its own business purpose for acquiring, managing or selling these intangible assets. ASARCO's fallacy is its refusal to recognize the fundamental principle that taxation of dividends or of interest or of capital gains is *not* taxation of the payor corporation. The Idaho Supreme Court recognized ASARCO's argument "rests upon a misconception of what the state sought to tax" [App. p. 27a] and therefore, correctly rejected ASARCO's assertion that this Court's decision in Mobil required modification of its original ruling.*

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* ASARCO's assertion that the Idaho Supreme Court "failed" to comply with this Court's direction on remand that it re-

(Continued on next page)

ASARCO suggests [J.S. p. 12] that this Court should review this case to remedy inconsistencies between the Idaho Court's ruling and the decisions of other state courts. However, the Idaho Court is in harmony with the recent decisions of this Court and decisions of other state courts. See, e. g., *Adams Express*, 165 U. S. 194 (1986), *rehearing*, 166 U. S. 185 (1897); *Bass, Ratcliff & Gretten v. State Tax Comm'n*, 266 U. S. 271 (1942); *Butler Bros. v. McColgan*, 315 U. S. 501 (1942); *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); *Underwood Typewriter Co. v. Chamberlain*, 245 U. S. 113 (1920); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U. S. 123 (1931); *Moorman Mfg. Co. v. Bair*, supra; *Exxon Corp v. Wisconsin Dept. of Revenue*, — U. S. —, 100 S. Ct. 2109 (1980); *Ford Motor Co. v. Beauchamp*, 308 U. S. 331 (1939); *International Harvester v. Department of Taxation*, 322 U. S. 435 (1944); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940); *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N. W. 2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N. W. 2d 612 (1965); *app. dism'd*, 384 U. S. 718 (1966); *F. W. Woolworth Co. v. Director of Division of Taxation*, 45 N. J. 466, 213 A. 2d 1 (1965); *Gulf Oil Corp v. Morrison*, 120 Vt. 324, 141 A. 2d 671

(Continued from previous page)

consider its decision "in light of" *Mobil* hardly merits response. [J.S. p. 9] The fact that the Idaho Court reinstated its original opinion without change, does not justify the conclusion that the Idaho Court did not carefully and analytically consider this Court's opinion in *Mobil*. The fact is that voluminous briefs were submitted to the Idaho Court both by parties and by amici curiae and full oral argument was held on remand. After due consideration and analysis of *Mobil*, the Idaho Court simply concluded that its original opinion was correct.

(1958); *F. W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A. 2d 839 (1972); *Sperry & Hutchinson Co. v. Department of Revenue*, 270 Or. 329, 527 P. 2d 729 (1974); *Appeal of W. J. Voit Rubber Co.*, May, 1974 C. C. H. Cal. Tax Rep. para 202-435; *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968*, 133 Vt. 132, 335 A. 2d 310 (1975); *Albany International Corp. v. Halperin*, 388 A. 2d 901 (Me. 1978); *Champion International Corp. v. Bureau of Revenue*, 88 N. M. 411, 54 P. 2d 1330 (1975); *John Deere Plow Co. v. Franchise Tax Board*, 38 Cal. 2d 214, 238 P. 2d 569 (1951), *app. dismissed for want of a substantial federal question*, 334 U. S. 939 (1952); *Qualls v. Montgomery Ward*, 266 Ark. 207, 585 S. W. 2d 18 (1979); *Montana Department of Revenue v. American Smelting and Refining Co.*, — Mont. —, 567 P. 2d 901 (1977), *app. dismissed*, 434 U. S. 104 (1978); *W. R. Grace & Co. v. Commissioner of Revenue*, — Mass. —, 393 N. E. 2d 330 (1979).

II.

The apportionment permitted by the Idaho Court does not contravene the Commerce Clause.

In Part III of its Jurisdictional Statement, ASARCO argues that Idaho is attempting to subject it to multiple taxation because the dividends in question were actually subjected to foreign withholding taxes.

There are several difficulties with this argument. The first and most obvious is that the record is utterly devoid of any fact or evidence establishing that such taxation actually took place. As the Idaho Court recognized:

> However, ASARCO has not established that it was in fact subject to multiple taxation and that the

> possibility of such multiple taxation has been rejected as a grounds for invalidating an apportionment statute. [App. p. 32a]

Regardless of whether it is the actuality or the substantial risk of taxation which is the proper test, it is clear that the taxpayer must prove that the risk or actuality exists. See *Northwestern States Portland Cement Co. v. Minnesota,* 358 U. S. 450 (1959); *General Motors Corp. v. Washington,* 377 U. S. 436, 439 (1974); *Standard Pressed Steel Co. v. Dept. of Revenue of Washington,* 419 U. S. 560, 563 (1975); *Moorman Mfg. Co. v. Bair,* 437 U. S. 267 (1968).

In any event, the argument is clearly without substantive merit. ASARCO, like Mobil, bases its argument on the holding in *Japan Line Ltd. v. County of Los Angeles,* 441 U. S. 434 (1979). ASARCO's position that it was subjected to the actuality of multiple taxation, whereas Mobil asserted only the risk of double taxation, does not distinguish this case from *Mobil.* What this Court had to say in *Mobil* more than adequately responds to ASARCO's argument:

> This argument is unpersuasive in the present context for several reasons. First, it attempts to focus attention on the effect of foreign taxation when the effect of domestic taxation is the only real issue. By admitting the power of the State of commercial domicile to tax foreign source dividends *in full,* Mobil necessarily forgoes any contention that local duplication of foreign taxes is proscribed. Thus, the only inquiry of constitutional dimension is the familiar question whether taxation by apportionment at home produces significantly greater tax burdens than taxation by allocation. Once appellant's argument is placed in this perspective, the presence or absence of taxation abroad diminishes in importance.

Second, nothing about the logic of Mobil's position is limited to dividend income. The same contention could be advanced about any income arguably earned from foreign commerce. If appellant's argument were accepted, state taxing commissions would face substantial difficulties in attempting to determine what income does or does not have a foreign source.

Third, appellant's argument underestimates the power of this Court to correct excessive taxation on the field where appellant has chosen to pitch its battle. A discriminatory effect on foreign commerce as a result of multiple state taxation is just as detectable and corrigible as a similar effect on commerce among the States. Accordingly, we see no reason why the standard for identifying impermissible discrimination should differ in the two instances.

Finally, acceptance of appellant's argument would provide no guarantee that allocation will result in a lesser domestic tax burden on dividend income from foreign sources. By appellant's own admission, allocation would give the State of commercial domicile the power to tax that income in full, without regard to the extent of taxation abroad. Unless we indulge in the speculation that a State will volunteer to become a tax haven for multinational enterprises, there is no reason to suspect that a State of commercial domicile will be any less vigorous in taxing the whole of the dividend income than a State like Vermont will be in taxing a proportionate share.

Moreover, ASARCO's argument that inclusion of the alleged "foreign source" dividends in Idaho's apportionment base results in multiple taxation, also ignores the fundamental distinction between state income taxes and income taxes imposed at a national level. As this Court observed in *Mobil*, supra:

Concurrent federal and state taxation of income, of course, is a well established norm. Absence some ex-

> plicit directive from Congress, we cannot infer the treatment of foreign income at the federal level mandates identical treatment by the States. The absence of any explicit directive to that effect is attested by the fact that Congress has long debated, but not enacted, legislation designed to regulate state taxation of income . . . Congress in the future may see fit to enact legislation requiring a uniform method for state taxation of foreign dividends. To date, however, it has not done so.

ASARCO attempts to avoid the *Mobil* ruling by suggesting, for the first time, that all income of this kind is immune from state taxation. [J.S. p. 16] There is not the slightest authority for the proposition that such income from intangibles is immune from all state income taxation—even by the state of the taxpayer's commercial domicile. The authority, in fact, is to the contrary. *Hawley v. Madden,* 232 U.S. 1 (1914); *Klein v. Bd. of Tax Supervisors,* 282 U.S. 19 (1930); *First Bank Stock Corp. v. Minnesota,* 301 U.S. 234 (1937); *Wheeling Steel Corp. v. Fox,* 298 U.S. 193 (1936). Even if double taxation is found to actually exist, this Court recognized in *Mobil* that "concurrent federal and state taxation of income, of course, is a well established norm." There is no reason to prohibit such concurrent taxation by state and foreign governments, when it exists as an "established norm" in regard to state and federal taxes.

The question is not whether the income is immune from state taxation, but rather which state or states may constitutionally subject it to taxation. The alleged risk of multiple taxation is not affected by a resolution of this issue. It is difficult to see how subjecting all of the income taxation at the taxpayer's state of commercial domicile creates a lesser risk of multiple taxation (on an interna-

tional level) than does apportioning the same income among several states in which the taxpayer conducts business. To the extent that there is any multiple taxation at all, a resolution of the issue presented here does not change that result. The Idaho Supreme Court's treatment of this issue—although couched in terms of the due process clause—is entirely consistent with this Court's treatment in *Mobil* quoted earlier. The Idaho Court said:

> If the due process clause were to prohibit the inclusion of dividends in a taxpayer's taxable income unless the payor corporation also conducts business within the taxing state, the due process clause would logically also prohibit the taxpayer's domicile from taxing those dividends if the payor corporation did not conduct its business within the domiciliary state, and indeed it would prohibit the United States and any state from ever taxing dividends paid the taxpayer by a corporation whose activities are located entirely without this country. The due process clause simply does not limit the right to tax dividends paid a taxpayer to the jurisdictions in which the payor corporation conducts its business. We believe that any constitutional limitations upon a state's right to apportion the intangible income, including dividends, of a multistate corporation doing business within the state are satisfied by the Idaho statutory requirement that the acquisition, management or disposition of the underlying asset must be an integral or necessary part of the taxpayer's unitary business, a part of which is conducted in this state. [Citations omitted] [App. p. 28a]

III.

The Due Process Clause does not require any part of a dividend payor corporation's property, payroll and sales to be reflected in the payee corporation's apportionment factors.

Even though ASARCO has not established by clear and cogent evidence that the formula applied by Idaho to ASARCO taxes extraterritorial income or values, ASARCO nevertheless argues, on authority of *Mobil*, that if dividends are apportionable, the formula must be adjusted by including the property, payroll and sale of the dividend payor corporation on a prorata basis to the apportionment factors. As the Idaho Court recognized, this conclusion is based upon the invalid assumption that the inclusion of dividends in apportionable income is the taxation of the payor corporation's profits, and that if dividends are included in apportionable income, a taxpayer is entitled to ASARCO's proposed apportionment relief as a matter of constitutional law without having to meet the burden of showing by clear and cogent evidence that the unadjusted formula reaches a disproportionate result. The Idaho Court responded to ASARCO's argument as follows:

> In the context of the second due process limitation—that the income attributed to Idaho for tax purposes must be rationally related to values connected with this state—ASARCO attacks the commission's computation of its tax liability on two grounds. ASARCO first argues that if the dividends it received are included as apportionable business income, then the due process clause requires that the property, payroll and sales factors of the dividend paying corporations be included in the denominator of the apportionment formula; otherwise ASARCO claims the income apportioned to Idaho would be disproportionate to the income producing activities within the state. This argument is premised on the same misconception about the entity and income the state is attempting to tax that we discussed above and has been soundly rejected for the same reasons. F. W. Woolworth Co. v. Commissioner of Taxes, 328 A. 2d 402 (Vt.

1974); see also F. W. Woolworth Co. v. Director of Division of Taxation, 213 A. 2d 1 (N.J. 1965). [App. p. 29a]

The fallacy of ASARCO's suggestion can be demonstrated with a simple illustration. Assume that Corporation A does business in two states—Idaho and Oregon. It conducts no business activities, owns no property, sells no products nor employs any person beyond the boundaries of those two states. Assume further, however, that Corporation A owns 49 percent of the stock of Corporation B. Corporation B confines all of its business activities to the State of Wyoming. Assume still further that the activities of Corporations A and B are so functionally interrelated as to be inseverable and that the unitary ties established by intercompany flow of goods and services, management and control and other activities clearly establish the sort of functional integration which even ASARCO must concede would, under the *Mobil* decision, permit Idaho to treat the dividends paid by Corporation B to Corporation A as apportionable business income of Corporation A.

ASARCO's contention would lead to the result that 49 percent of Corporation B's Wyoming property, payroll and sales would be added to the denominators of Corporation A's property, payroll and sales both in Idaho and in Oregon in each year B pays dividends to A. The Idaho numerators and the Oregon numerators would remain unchanged. These factors would then be averaged to determine the Idaho and Oregon apportionment factors. If the resulting Idaho and Oregon apportionment factors are added together, they will not equal 100 percent. (Because the numerators of the Idaho and Oregon factors,

when added together, will not equal the denominators.) But in our illustration, Corporation A conducts business activity in no state other than Idaho and Oregon. Accordingly, it must follow that all of its taxable income must be earned in those two states. What has happened to the remainder of the income? The addition of Wyoming property, payroll and sales values to Corporation A's denominators has caused some of the income to be attributed to Wyoming—a state in which Corporation A has no tax situs and conducts no business activities. It seems imminently obvious that Corporation A, because it conducts no business activities whatsoever in Wyoming, cannot be said to have earned taxable income in Wyoming. ASARCO's formula does exactly what ASARCO itself admits is unconstitutional; it attributes income to a place where it is not—and cannot be—earned.

The answer to this apparent dilemma is very simple. The dividend income earned by a shareholder corporation is its own income. ASARCO's suggestion ignores the fact that Idaho seeks to tax—and may only tax—ASARCO's income. The Idaho Court has recognized that fact in its first decision when it stated:

> The commission did not levy a tax upon the income of the dividend-paying corporations; rather, it levied a tax upon ASARCO's income. These dividends are clearly part of ASARCO's income and it is unquestioned that there is sufficient connection between ASARCO and this state to constitutionally permit the state to tax its proper share of ASARCO's income. [App. p. 28a]

Because dividend income is the payee corporation's income, it is entirely inappropriate to add the payor corporation's property, payroll or sales to the payee's factors. They are simply different taxpayers.

Another difficulty with ASARCO's suggestion is that there is neither a legal, nor a logical, nor a practical relationship between the payor corporation's property, payroll and sales activities and its payment of dividends. Even if we presume that somehow the payor's property, payroll and sales factors are attributable in part to the payee, the decision by the payor corporation to pay dividends or to defer paying dividends may or may not be related to the amount of its property, payroll and sales or even to whether the payor corporation has had a profit or a loss year. It makes absolutely no sense to force upon the payee corporation a share of the payor corporation's property, payroll and sales for apportionment formula purposes in the year in which the payor corporation elects to pay a dividend.

A final difficulty is that the payee corporation may not even have access to, or any ability to obtain, information about the payor corporation's property, payroll and sales so that it could make any adjustments to its own factors. Mobil Oil Company's 10 percent ownership in ARAMCO illustrates the problem. If the Saudia Arabian government (which controls ARAMCO) chooses not to tell Mobile what ARAMCO's property, payroll and sales figures may be, there is no way that an adjustment like that suggested by ASARCO could be made.

In short, ASARCO's argument that the *Mobil* decision somehow requires adjustments to be made to the apportionment formula factors is utterly without merit.

Finally, the Idaho statute provides to ASARCO the precise remedy which ASARCO here seeks but it has refused to avail itself of that remedy. The Idaho statute specifically allows "combined reporting" of the income of

parent and subsidiary corporations when the activities of the corporation are so closely integrated that they constitute a single business enterprise. *Idaho Code* § 63-3027(s) as in effect during the years in question here, provided:

> For purposes of this section a parent and subsidiary corporation may, when necessary to accurately reflect income, be considered a single corporation. [App. p. 73a]

The trial court in this matter, in fact, did require that six wholly owned subsidiaries should be combined and treated as a single taxpayer. [See Findings of Fact 18-24 and Conclusion of Law 2—App. pp. 41a-42a, and 44a] ASARCO did not appeal the trial court's determination that six of the subsidiaries should be combined. Treatment of the combined group of corporations as a single taxpayer means that all of the income and all of the property, payroll and sales of the combined group is used in the apportionment process. The existence of this option under the Idaho statute, remedies any constitutional defect that might otherwise exist. ASARCO cannot be heard to complain that it has been unfairly taxed when it has failed to avail itself of—and at the trial court level, vigorously opposed the use of—statutory provisions which would have permitted it to recognize in its apportionment scheme the property, payroll and sales of the subsidiary corporations.

IV.

The decision of the Idaho Supreme Court is not a final judgment.

The jurisdiction of this Court to review the decision of the Idaho Supreme Court is, of course, based upon

28 U. S. C., § 1257 which limits the appellate jurisdiction of this Court to review of "final judgments." The Idaho Supreme Court's decision [App. pp. 33a-35a] remanded the case to the trial court for a determination of certain factual issues relating to the proper determination of the sales factor portion of the apportionment formula. The issue remanded by the Idaho Court to the trial court is not severable from the issues upon which the Appellant seeks review but is necessarily related. A determination of the proper application of the sales factor under the UDITPA three-factor formula is necessary before it can be finally known what absolute amount or portion of ASARCO's total income Idaho will deem to have been earned from Idaho sources. This Court has held that a state taxing scheme must be judged based upon the result which it reaches. For example, in *Hans Rees' Sons v. N. Carolina*, 283 U. S. 123 at 135 (1931), the court held a North Carolina tax unconstitutional because:

> . . . [T]he statutory method, as applied to appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income all out of appropriate proportion to the business transaction transacted by the appellant in that State.

Other decisions also support the proposition that a state tax must be measured based upon its known result. In *Wisconsin v. J. C. Penney Company*, 311 U. S. 435, 444 (1940), the Court stated:

> That test is . . . whether the taxing power exerted by the state bears fiscal relationship to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

See also *Hump Hairpin Co. v. Emmerson,* 258 U. S. 290, 296 (1922) and *International Harvester v. Evatt,* 329 U. S. 416 (1947).

So long as the state courts have yet to determine how the sales factor portion of the three-factor UDITPA formula is to be applied to this taxpayer, the full extent of this taxpayer's income which the state is subjecting to income taxes is not known.

It is important that the entire apportionment formula as used in UDITPA and enacted in Idaho be clearly understood. It is found in *Idaho Code* § 63-3027. [App. p. 67a] The steps for determining the amount of an interstate taxpayer's income which is attributable to Idaho are as follows: First, the total net taxable income from all activity and sources both within and without the State of Idaho is determined. Second, the amount of nonbusiness (nonunitary) income is computed and subtracted from the amount determined in step one. This result is the net business (unitary) income subject to apportionment. Third, an apportionment factor is computed. This apportionment factor is the average of three factors—sales in the taxing stated divided by sales everywhere plus real and tangible personal property in the taxing state divided by such property everywhere plus payroll in the taxing state divided by payroll everywhere. Fourth, the apportionment factor as computed in the third step is applied to the net apportionable business income computed in the second step to determine the amount of apportionable income to be attributed to the taxing state. Fifth, any nonbusiness income found to be allocable in its entirety to the taxing state is added to the result determined in the fourth step. This sum represents the income sub-

ject to the tax in the taxing state and to which that taxing state's tax rate may be applied.

The record does not reflect the precise amount of ASARCO's taxable income attributed to Idaho which a resolution of the sales factor issue might affect. The record does reflect that virtually all of the sales attributed to Idaho are included in the disputed amount. It is reasonable to conclude, therefore, that approximately one-third of ASARCO's total income tax liability to the State of Idaho may remain in question.

Therefore, it can be clearly seen that the issues decided by the Idaho Supreme Court and the issue remanded by it to the trial court for further decision are inextricably tied together since all of the issues relate to the determination of variables in the same apportionment formula. The constitutional test by which that formula is measured is whether or not it attributes an amount of income which is in "appropriate proportion to the business transacted by the appellant" in the State of Idaho. [*Hans Rees' Sons*, supra]

CONCLUSION

For the reasons stated herein, this appeal should either be dismissed or affirmed.

DATED this —— day of June, 1981.

Respectfully submitted,

THEODORE V. SPANGLER, JR.
Deputy Attorney General
State of Idaho

Counsel for Appellee

Office-Supreme Court, U.S.
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NO. 80-2015

In The

Supreme Court of the United States

October Term, 1980

ASARCO INCORPORATED (formerly AMERICAN SMELTING AND REFINING COMPANY),

Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal From the Supreme Court of Idaho

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

William D. Dexter
General Counsel
Multistate Tax Commission

204 Custer Way
Tumwater, WA 98501
(206) 357-8000

Counsel for Amicus Curiae

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether the apportionment provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) contravenes either the Due Process or Commerce Clause limitations of the United States Constitution, as interpreted and applied by the Idaho Supreme Court in the instant case, wherein it held that income from investments in stocks was apportionable to the extent such investments were utilized by ASARCO as an integral part of its trade or business operations which it carried on in part in Idaho for the tax years in question.

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BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission in support of the Appellant's Motion to Dismiss or Affirm. Both parties to this proceeding have consented to the filing of this brief.[1]

[1]Originals of the consent letters have been filed with the Clerk of the Court.

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) entered into currently by 19 states, including Idaho and the District of Columbia as full members, and by 11 states as associate members.[2]

The purposes of the Compact are to:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatability in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicate taxation.[3]

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[2]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and West Virginia. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania and Tennessee.

[3]The constitutionality of the Compact was upheld by the United States Supreme Court in *U. S. Steel, et al. v. Multistate Tax Commission, et al.*, 434 U. S. 452 (1978), affirming 417 F. Supp. 795 (S. D. N. Y. 1976). The Court there noted that the Compact ". . . symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both state and taxpayer."

In fulfillment of these objectives, in the area of state income taxation of multistate-multinational business, Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA).[4] The purpose of UDITPA is to provide for the uniform allocation and apportionment of income for state income tax purposes by those states that have adopted it. It has been adopted by a great majority of the income tax states.[5] It applies to all classes of taxpayers (individuals, partnerships, etc.) except financial institutions and public utilities. It provides for the specific allocation or apportionment of all the income of all the included taxpayers except the personal service income of individuals. UDITPA apportions "business income" in accordance with the well-recognized three-factor apportionment formula of tangible property, payroll and sales. "Nonbusiness income" is specifically allocated as provided for therein.[6]

Pursuant to its authority under Article VII of the Compact, the Commission approved revised uniform allocation and apportionment regulations on February 21,

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[4]UDITPA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1957. Uniform Laws Annotated, Vol. 9A, p. 448, et seq.

[5]11th Annual Report of the Multistate Tax Commission, 1977-1978, App. B, p. 28.

[6]Section 1 (a) of UDITPA defines "business income" as:

> Income arising from transactions and activities in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Section 1 (e) defines nonbusiness income subject to specific allocation as "all income other than business income."

1973, which implement UDITPA. Idaho and approximately 17 other states have adopted these regulations substantially in the form as adopted by the Commission.[7] These regulations embody an interpretation of the language of UDITPA.

It is important that the UDITPA provisions be interpreted to carry out the purpose of the 29 states, including Idaho, in adopting the uniform allocation and apportionment rules contained therein. This purpose is to provide for uniformity and full accountability (without duplication) in the division of income for state income tax purposes by workable and rational division of income rules.[8]

The Commission and its member states are concerned with the proposition advanced by ASARCO that, under the United States Constitution, dividends, interest and capital gains and presumably other income from business-related intangible property, must be arbitrarily assigned, for state income tax attribution purposes, to the commercial domicile or to the location of the payors of the income, rather than to where the taxpayer utilizes these intangible properties in the conduct of its unitary business activities, as required by a reasonable interpretation and application of the UDITPA definition of "business income".

More particularly, in the instant matter, the Commission and its member states are concerned with the

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[7]Results of a survey on the Uniformity of State Laws by the State of Indiana dated February 15, 1977.

[8]Prefatory note to UDITPA, Uniform Laws Annotated, Vol. 9A, p. 448; *GTE Automatic Electric v. Allpin*, 68 Ill. 2d 326, 369 N. E. 2d 941 (1977) and Pierce, "The uniform Division of Income for State Tax Purposes," 35 Taxes 747 at 748 and 749 (1957).

novel proposition, advanced by ASARCO, that *Mobil Oil Corp. v. Comm'r. of Taxes of Vermont*, 445 U. S. 425 (1980) supports the proposition that only the income from investments in the stock of payors, which conduct a unitary business with a payee taxpayer is apportionable; and, if apportionable, this income must, as a matter of constitutional law, be attributable to the business activities of the payor corporations. The acceptance of this argument would require this Court to declare the attribution provisions of UDITPA unconstitutional even though UDITPA requires apportionment of only the unitary income of a unitary business which is carried on in part in the taxing state. The purpose of this brief is to demonstrate that *Mobil* and other controlling decisions of this Court preclude any such result and to indicate that this Court should either dismiss this appeal for want of a substantial federal question or affirm the decision below of the Idaho Supreme Court.

COUNTER STATEMENT OF THE CASE

The Commission accepts ASARCO's Statement of the Case except it *disagrees* with ASARCO's statements pertaining to its relationship with its subsidiaries from which it derived the dividends in question and with the Statement's omission of important facts.

Irrespective of how this relationship is described and characterized, it is important to note that there is no claim made by ASARCO that it, as a single corporate entity, did not conduct all of its own business operations as a single unitary business nor that the dividends, capital

gains and interest in question did not result from stock investments to further ASARCO's own business operations as a single corporate entity. In short, there is nothing in the record to establish that the dividends, capital gains and interest in question were not attributable to ASARCO's unitary business operations which it conducted in part in Idaho for the years in question. Neither is there anything in the record, except ASARCO's "separate accounting" argument, to establish that the UDITPA apportionment formula, as applied to ASARCO's total income from its unitary business, assigns any income to Idaho not reasonably related to ASARCO's Idaho activities for the years in question.

Irrespective of how ASARCO would characterize its relationship with its affiliated corporations in question, the controlling fact, as found by the Idaho Supreme Court, is that the dividends, capital gains and interest in question were derived by ASARCO from ASARCO's stock investments which it acquired, managed and disposed of as an integral and necessary part of its mining and smelting business which it carried on in part in Idaho for the years in question (Juris. Stat., p. 22a).

Based on this finding, which is not challenged here, the Idaho Supreme Court upheld that apportionability of the dividends, capital gains and interest in question as "business income," as defined in section 1 (a) of UDITPA. Also, based on its finding that ASARCO did not establish by clear and cogent evidence that the application of the UDITPA formula by Idaho to ASARCO's business income reached extra-territorial values on income, the Idaho Supreme Court denied ASARCO's claim for apportionment relief.

THE ARGUMENT

The Court should either dismiss this appeal or affirm the decision below because Woolworth has raised no substantial federal question.

A. Mobil Did Not Limit the Apportionability of Dividends to Dividends Received by a Payee Corporation From Payor Corporations Which Conducted a Unitary Business With the Payee Corporation and It Supports the Apportionability of All Income Related to the Taxpayer's Unitary Business.

An examination of the *Mobil* decision indicates that due process constitutional limitations are satisfied, if dividends are from stock investments related to the taxpayer's own unitary business which it conducts in part in the taxing state. Thus, ASARCO's contention that *Mobil* requires this Court to determine whether the UDITPA apportionment provisions are constitutional is totally without merit.

After citing the salient facts and the history of the proceedings, this Court defined the issue in *Mobil*. Since it found that Mobil did not question the accuracy or fairness of Vermont's apportionment formula, but rather elected to attack the tax base, it did not consider, "whether application of Vermont's formula produced a fair attribution of appellant's dividend income to that state." (445 U. S. 425, 434)

As to the reasonableness of the apportionment formula, it stated:

> "Nor has appellant undertaken to prove that the amount of its tax liability as determined by Vermont is 'out of all appropriate proportion to the business

> transacted by appellant in that State.' *Hans Rees & Sons v. North Carolina, ex re Maxwell,* 283 U. S. 123, 135 (1931)." (Footnote omitted; Ibid, at 437)

Mobil was then limited to the question of,

> "* * * whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method." (445 U. S. 425, 435)

In addressing this question, the *Mobil* court noted that the record lacked detail concerning the relationship of the activities of these corporations to Mobil's petroleum business. It found that, "Mobil offered no evidence that would undermine the conclusion that most, if not all, of its subsidiaries and affiliates *contribute to appellant's* [*Mobil's*] *worldwide petroleum enterprise.*" (Emphasis and bracketed material added; 445 U. S. 425, 435.)

This Court then considered the three principal constitutional arguments of Mobil: (1) that no "nexus" existed between Vermont and Mobil's management of its stock investments or between Vermont and the business activities of the dividend payor corporations; (2) that Mobil was subject to possible multiple taxation because of the power of the state of its commercial domicile (New York) to tax the dividends in full; and, (3) that Mobil was subject to multiple taxation at the international level because the dividends were from foreign sources.

In reference to Mobil's due process argument, this Court reaffirmed the propositions (1) that interstate commerce is not immune from a fairly apportioned state income tax; (2) that, for a state to tax income generated in interstate commerce, due process requires only a "min-

mal connection" between the interstate activities and the taxing state and "a rational relationship between the income attributed to the state and the intrastate values of the enterprise;" and (3) that due process does not invalidate a tax simply because it is "contingent upon events brought to pass without a state" (445 U. S. 425, 437).

The Court concluded that Mobil did not contest these general principles. The Court found that Mobil's due process "nexus" argument turned on something about the nature of dividend income that distinguishes it from operating income. From Mobil's argument, the Court discerned only two factors which Mobil contended would differentiate dividend income from operating income, namely, the alleged "foreign source" of the income and the fact that the income was received in the form of dividends.

The Court equated Mobil's "foreign source" due process argument with an effort by Mobil to "separately account" for dividends by ascribing to them a geographical "source." In disposing of this argument, the Court stated:

> "The argument that the source of the income precludes its taxability runs contrary to precedent. In the past, apportionability often has been challenged by the contention that income earned in one State may not be taxed in another if the source of the income may be ascertained by separate geographical accounting. *The Court has rejected that contention so long as the intra-state and extra-state activities formed part of a single unitary business.* See *Butler Bros. v. McColgan*, 315 U. S. 501, 506-508 (1942); *Ford Motor Co. v. Beauchamp*, 308 U. S. 331, 336 (1939); Cf. *Moorman Mfg. Co. v. Bair*, 437 U. S., at 272. * * *"
>
> "The Court has applied the same rationale to businesses operating both here and abroad. *Bass, Ratcliff &*

Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924), is the leading example." (Emphasis added; 445 U.S. 425, 438.)[9]

Then, it concluded:

> "As these cases indicate, *the linchpin of apportionability* in the field of state income taxation *is the unitary business principle.* In accord with this principle, *what appellant must show*, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, *is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State.*" (445 U.S. 425, 439; Emphasis added.)

In disposing of the "form of dividends" argument, this Court rejected Mobil's contentions that its ownership or management of stock investments constituted a business distinct from its sale of petroleum products. In so doing, it stated:

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[9]*Butler Bros. v. McColgan*, 315 U.S. 501 (1942), upheld the apportionment of the unitary income of Butler Bros. even though Butler Bros. had shown that the apportionment arrived at a substantially different result than its separate geographical accounting. It then held that "* * * the results of the accounting system employed by the appellant [Butler Bros.] do not impeach the validity or propriety of the formula which California has applied here." (315 U.S. 501 at 508).

In *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, the Supreme Court held that a proportionate value of Ford Motor Company far in excess of the value of properties located in Texas by "separate accounting" could be attributable to Texas for net worth franchise tax purposes because "In a unitary enterprise, property outside the state necessarily affects the worth of the privileges within the state." (308 U.S. 331 at 336).

In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), it held that apportionment, unlike "separate accounting" "* * * does not purport to identify the precise source of a corporation's profits; rather, it is employed as a rough approximation of a corporation's income that is reasonably related to the activities conducted within the taxing State." (437 U.S. 267 at 273).

> *"So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business."* (Emphasis added; 445 U. S. 425, 440.)

It then concluded:

> "We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business. *Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business."* (445 U. S. 425, 441, 442.)

By this statement, the Court did tie the apportionability of the dividends in question to the relationship between the business of the payor corporations and that of Mobil.

However, it assumed apportionability of dividends where the business activities of the payor corporations were related in some manner to the business of the payee corporations.

Furthermore, it did not condition apportionability on the conclusion that Mobil conducted a unitary business with the payor corporations.

These considerations alone, completely refute ASARCO's argument that *Mobil* requires this Court to review the ASARCO's decision below; for, clearly, the Idaho Supreme Court limited the apportionability of dividends in *ASARCO* to dividends ASARCO derived from investments in payor corporations whose businesses were related to ASARCO's non-ferrous metals business.

Inasmuch as due process and commerce clause issues are interrelated, *International Harvester Co. v. Department of Treasury,* 322 U. S. 340 at 353 (1944), disposition of the commerce clause issue in *Mobil* is relevant for due process purposes. In holding that dividends were subject to apportionment, *Mobil* rejected the claim that the commercial domicile had an exclusive right to tax the dividends in full; and, in case of conflict, opted for apportionment of income from intangibles which were from investments related to the unitary business of the taxpayer. As stated in *Mobil:*

> "[10, 11] Taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained. See *Standard Oil Co. v. Peck,* 342 U. S. 382, 384, 72 S. Ct. 309, 310, 96 L. Ed. 427 (1952). We find no adequate justification, however, for such a preference. Although a fictionalized situs for intangible property sometimes has been invoked to avoid multiple taxation of ownership, there is nothing talismanic about the concepts of 'business situs' or 'commercial domicile' that automatically renders those concepts applicable when taxation of income from intangibles is at issue. The Court has observed that the maximum *mobilia sequenter personam,* upon which these fictions of situs are based, 'states a rule without disclosing the reasons for it.' *First Bank Stock Corp. v. Minnesota,* 301 U. S., at 241, 57 S. Ct., at 680 (1937). *The Court also has recognized that 'the reason for a single place of taxation no longer obtains' when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. Curry v. McCanless,* 307 U. S. 357, 367, 59 S. Ct. 900, 906, 83 L. Ed. 1339 (1939).
>
> [12, 13] The reasons for allocation to a single situs that often apply in the case of property taxation carry little force in the present context."

* * *

"* * * there is no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method. Since Vermont seeks to tax income, not ownership, we hold that its interest in taxing a proportionate share of appellant's dividend income is not overridden by any interest of the State of commercial domicile." (Emphasis added; 445 U. S. 425, 444, 445).

Here, it is clear that *Mobil* refers to the utilization of intangibles in the unitary business of the payee taxpayer.

Thus, for both commerce and due process purposes, the controlling question is whether stock investments, giving rise to dividends, are made in connection with or are in some way related to the unitary business of the recipient.

The decisions of this Court, including those relied on in *Mobil*, support this position. See, e. g., *Adams Express, supra; Bass, Ratcliff & Gretton v. State Tax Comm'n*, 266 U. S. 271 (1924); *Butler Bros. v. McColgan*, 315 U. S. 501 (1942); *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); *Underwood Typewriter Co. v. Chamberlain*, 245 U. S. 113 (1920); and *Moorman Mfg. Co. v. Bair, supra; Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U. S. 207 (1980); and *Ford Motor Co. v. Beauchamp, supra.*

All of these apportionment cases dealt with the unity of a single corporation; they upheld the apportionment of the entire property, values or income attributable to or arising in connection with the operations of a single unitary corporate entity. The same is true concerning

many state income tax cases which have applied the unitary concept in determining the apportionability of income from intangibles.[10] Nothing in *Mobil* conflicts with the holdings in these cases. This is affirmed beyond any question by this Court's decision in *Exxon, supra.*[11]

Mobil did not distinguish dividends from other income for constitutional purposes. Therefore, the same considerations were applied there to determine the apportionability of dividend income as were applied to determine the apportionability of any other class of income, i.e., whether the income is derived from investments or activities related to the taxpayer's unitary business.

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[10]See, e. g., *International Harvester v. Department of Taxation,* 322 U. S. 435 (1944); *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435 (1940); *Montgomery Ward & Co. v. Commissioner of Taxation,* 276 Minn. 479, 151 N. W. 2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Taxation,* 272 Minn. 403, 138 N. W. 2d 612 (1965), app. dism'd 384 U. S. 718 (1966); *F. W. Woolworth Co. v. Director of Division of Taxation,* 45 N. J. 466, 213 A. 2d 1 (1965); *Gulf Oil Corp. v. Morrison,* 120 Vt. 324, 141 A. 2d 671 (1958); *F. W. Woolworth Co. v. Commissioner of Taxes,* 130 Vt. 544, 298 A. 2d 839 (1972); *Sperry & Hutchinson Co. v. Department of Revenue,* 270 Or. 329, 527 P. 2d 729 (1974); *Appeal of W. J. Voit Rubber Co.,* May, 1947 C. C. H. Cal. Tax Rep. para. 202-435; *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968,* 133 Vt. 132, 335 A. 2d 310 (1975); *Albany International Corp. v. Halperin,* 388 A. 2d 901 (Me. 1978); *Champion International Corp. v. Bureau of Revenue,* 88 N. M. 411, 54 P. 2d 1330 (1975); *John Deere Plow Co. v. Franchise Tax Board,* 38 Cal. 2d 214, 238 P. 2d 569 (1951), app. dismissed for want of a substantial federal question, 334 U. S. 939 (1952); *Qualls v. Montgomery Ward,* 266 Ark. 207, 585 S. W. 2d 18 (1979); *Montana Department of Revenue v. American Smelting and Refining Co.,* — Mont. —, 567 P. 2d 901 (1977), app. dismissed, 434 U. S. 104 (1978); *W. R. Grace & Co. v. Commissioner of Revenue,* — Mass. —, 393 N. E. 2d 330 (1979).

[11]This is clearly demonstrated by Idaho's analysis of *Exxon* in its Motion to Dismiss or Affirm.

Obviously, apart from the unitary ties between the business of a payee corporation and that of payor corporations, there can exist a relationship between stock investments and the business of the payee corporation which is sufficient to justify the apportionment of dividends or other income from investments in intangibles.

The key question as to apportionability of income under due process limitations is: "Is the income from investments related to or made in furtherance of the unitary trade or business of the taxpayer?" Framing the due process issue in this manner does not mean that the relationship of the business of the payor to the business of the payee taxpayer is irrelevant in determining whether the income from stock investments is includable in apportionable income. It simply means that it is not controlling. A taxpayer might make a stock investment to obtain a market for its product or for a source of supplies. Such considerations are relevant however, only to determine the relationship of an investment to the unitary business of the taxpayer. Other considerations are equally important for this purpose.

That *Mobil* does not limit the apportionability of dividends to only those cases or circumstances where the payor corporations and the payee corporation are engaged in a single unitary business, is supported by the fact that *Mobil* upheld the apportionment of Mobil's ARAMCO dividends in which it owned only a 10% stock interest, which limited ownership precluded a finding that Mobil conducted a unitary business with ARAMCO. Inasmuch as Mobil's investment in ARAMCO stock assured it of a supply of crude oil in its petroleum business, ARAMCO dividends are clearly apportionable be-

cause the ARAMCO stock investment of Mobil is related to the petroleum business of Mobil.

Likewise, it seems clear that *Mobil* does not limit the apportionability of dividends to only those situations where the payor and payee corporations are engaged in similar lines of business.[12] Thus, nothing in *Mobil* would invalidate the apportionment of dividends as "business income" as defined in Section 1(a) of the Uniform Division of Income for Tax Purposes Act (UDITPA).[13]

In sum, *Mobil* supports the proposition that all "net income" received from stock and other investments held in connection with or for a purpose related to the payee's unitary business operations is subject to apportionment.[14]

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[12]For example, in footnote 9 of the dissent in *Mobil*, (445 U. S. 425, 456), most of the corporations there listed are not in the same kind of business as Mobil and they are not controlled by Mobil. However, if Mobil's investments in the stock of these listed public utilities corporations were made by Mobil to insure sources of supply of energy for use in Mobil's petroleum business, there is a sufficient relationship between such stock investments and Mobil's petroleum business to support apportionability of the dividends received by Mobil from these investments.

[13]Section 1 (a) of UDITPA, as illustrated by the case of *ASARCO v. Montana*, — Mont. —, supra, 567 P. 2d 901 (1977), appeal dismissed, 434 U. S. 1042 (1978) simply requires a tie-in between the unitary business operations of the taxpayer and its stock investments from which dividends are derived.

[14]Given the history of the taxation of intangibles, the abstract nature of a net income tax, the lack of any fixed situs for intangible properties, and the fact that apportionment does not attempt to situs income to any source, this conclusion is amply justified.

B. Mobil Did Not Require the Court Below to Modify its Holding in ASARCO That the UDITPA Apportionment Factors, Without Modification, Constitutionally Apportioned ASARCO's Apportionable Income, Including Income From Its Intangibles, to Idaho.

Since Mobil did not contest the reasonableness of the Vermont three-factor apportionment formula in *Mobil,* this Court did not pass on this question. However, there is nothing in *Mobil* which changes one *iota* the burden imposed on ASARCO to establish by clear and cogent evidence that the UDITPA apportionment formula, as applied in *ASARCO,* taxed any extra-territorial income or values of ASARCO.

The *Mobil* court reaffirmed this test when it noted that Mobil had not proved that its Vermont income tax liability was "out of all appropriate proportion to the business of Mobil transacted in Vermont." (445 U. S. 425, 437).

The only ground asserted in *ASARCO* by ASARCO to invalidate the apportionment result was the fact the apportioned income exceeded the amount attributable to Idaho by ASARCO's separate accounting. Since "separate accounting" results do not invalidate an apportionment formula (*Butler Bros. v. McColgan, supra, Moorman Mfg. Co. v. Bair, supra, Exxon Corp. v. Department of Revenue of Wisc., supra*), ASARCO has not advanced any valid ground for apportionment formula relief.

The fact that apportionable income includes substantial amounts of income from intangible properties, does not trigger any apportionment relief as a matter of law. In fact, if intangible properties are associated with

the unitary business operations of a taxpayer, there is no logical reason why the income from these intangibles should not be assigned to where its unitary business operations are conducted as reflected by the UDITPA apportionment formula. *Adams Express v. Ohio State Auditor*, 166 U. S. 185, 218 (1896).

Principles enunciated in *Butler Bros. v. McColgan*, *supra*, are still controlling:

> "One who attacks a formula of apportionment carries the distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed. See *Norfolk & Western Ry. Co. v. North Carolina*, 297 U. S. 682, 688, 56 S. Ct. 625." (315 U. S. 501, 507).
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> • • •
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> "At least since *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 S. Ct. 305, this Court has recognized that the unity of use and management of a business which is scattered through several states may be considered when a state attempts to impose a tax on an apportionment basis." (Ibid. at 508).
>
> • • •
>
> "We cannot say that property, payroll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that *these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned from this unitary business. And no showing has been made that income connected with the unitary business has been used in the formula.*" (Emphasis added; Ibid., at 509).

Thus, *Mobil* does not require a modification of the UDITPA formula unless the formula, as applied, is shown to tax extra-territorial values or income; which is not the case here. To invalidate the apportionment result here in issue, ASARCO relied in the Court below on its separate accounting. Here, it contends that the formula is invalid as a matter of law because it does not include the factors of the payors of the dividends. Both positions are irrelevant.

C. Mobil Does Not Require This Court to Exclude the Dividends, Interest and Capital Gains in Question From Apportionable Income Because Their Taxation is Precluded by the Commerce Clause.

In resolving the multiple taxation commerce clause argument, the *Mobil* court rejected the arguments of Mobil based on speculative multiple taxation and *Japan Line Ltd. v. County of Los Angeles,* 441 U. S. 434 (1979).

In disposing of Mobil's reliance on *Japan Line,* this Court noted:

> "Appellants' attempted analogy between this case and *Japan Line* strikes us as forced. That case involved ad valorem property taxes assessed directly upon instrumentalities of foreign commerce. As has been noted, the factors favoring use of the allocation method in property taxation have no immediate applicability to an income tax." (100 S. Ct., at 1237).

ASARCO would distinguish Mobil by here arguing that it has established multiple taxation in fact by reference to the tax laws of foreign countries (Juris. Stat., p. 16, footnote 14).

However, the Court below found that ASARCO has not established that it was in fact subject to multiple tax-

ation and that the possibility of such double taxation has been rejected as a ground for invalidating an apportionment statute (Juris. Stat., p. 32a).

Thus, nothing in *Mobil* requires any modification of ASARCO on either domestic or foreign commerce grounds.

D. To Condition the Constitutionality of Inclusion of Income From Stock Investments Upon a Finding That the Investments are in Corporations Which Conduct a Unitary Business With the Investor is Illogical and Should Not Be Read Into Mobil.

Reg. IV.1.(c)(4) of the Commission UDITPA regulations sets forth the following examples of apportionable dividends income under UDITPA:

> "Example (ii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are business income.
>
> "Example (iii): The taxpayer and several unrelated corporations own all of the stock of a corporation whose business operations consist solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing business. The dividends are business income.
>
> "Example (iv): The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for

these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to current liabilities. In order to maintain an adequate bonding capacity the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are business income.

"Example (v): The taxpayer receives dividends from the stock of its subsidiary or affiliate which acts as the marketing agency for products manufactured by the taxpayer. The dividends are business income."

These examples are obvious illustrations of investments in stocks made for purposes clearly associated with the taxpayer's unitary business operations. An investment in stock for such a business purpose is further illustrated by the following hypothetical example:

Assume that Corporation X conducts a business which requires the use of substantial amounts of electrical energy and it desires to locate a plant in an area where the local electric utility does not have the existing capacity to furnish Corporation X with the needed energy. Assume further that Corporation X agrees with the local utility to supply it with capital to expand the utility's electrical energy capacity and purchases a minority stock interest in the utility for this purpose.

Under this example, it is clear that the stock was acquired for an essential purpose directly associated with the business of Corporation X. It is inconceivable that, under these facts, that the dividends from this stock, which represent at least in part Corporation X's deductable energy costs, cannot be apportioned for lack of a due process connection with Corporation X's business. Under this example, in a due process constitutional sense, why should the apportionability result be any different

than if Corporation X had acquired a controlling interest in the local utility or formed its own utility in which it owned a controlling interest? We can conceive no difference.

The foregoing examples are not constitutionally distinguishable from Mobil's investment in ARAMCO stock which was held apportionable in *Mobil*. In each instance, the controlling question is the relationship of the stock investments to the taxpayer's trade or business operations in the taxing state. If there is a relationship, due process is satisfied.

CONCLUSION

Inasmuch as the Supreme Court of Idaho's decision below is supported by substantial precedent of this Court, including its recent decisions of *Mobil* and *Exxon*, ASARCO has raised no substantial federal question by this appeal. The issues that ASARCO asserts were undecided by *Mobil* have been laid to rest by numerous decisions of this Court. They merit no further consideration. In substance, these issues are based on the erroneous and novel proposition that the income from stock investments, as a matter of constitutional law, is not income attributable to such investments, but, rather, constitute the income of the corporations in which the stock investments are made. ASARCO thus contends that its income from stock investments should be excluded from its apportionable business income under UDITPA; or if included, should be assigned to the corporations in which it made the stock investments. Therefore, it is respect-

fully submitted that this Court should either dismiss the appeal for a lack of a substantial federal question or affirm the judgment of the Idaho Supreme Court.

Respectfully submitted,

WILLIAM D. DEXTER

Counsel for Amicus Curiae

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No. 80-2015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant*,

v.

IDAHO STATE TAX COMMISSION, *Appellee*.

Appeal from the Supreme Court of Idaho

BRIEF OF APPELLANT

GEORGE W. BEATTY
(Counsel of Record)
C. RUDOLF PETERSON
WILLIAM L. GOLDMAN
JAMES A. RIEDY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501

Counsel for Appellant

ALEXANDER J. GILLESPIE, JR.
120 Broadway
New York, N.Y. 10271

Of Counsel

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QUESTIONS PRESENTED

1. Whether, under the "unitary business" test set forth by this Court in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), Idaho's inclusion in appellant's apportionable business income of dividends paid to appellant by five functionally independent subsidiaries and affiliates contravenes the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether Idaho's inclusion in appellant's apportionable business income of interest and capital gains attributable to appellant's investments in such subsidiaries and affiliates contravenes the Due Process Clause.

3. Alternatively, whether Idaho's inclusion of the foregoing dividends, interest, and capital gains in appellant's apportionable business income, without a correlative adjustment in the apportionment factors, contravenes the Due Process Clause.

4. Alternatively, whether Idaho's inclusion of certain foreign-source dividends and interest in appellant's apportionable business income, without a correlative adjustment in the apportionment factors, contravenes the Foreign Commerce Clause of Article I, Section 8 of the Constitution.

SUBSIDIARIES AND AFFILIATES OF APPELLANT

As required by Rule 28.1 of the Rules of this Court, a list of appellant's subsidiaries (other than wholly owned subsidiaries) and affiliates is set forth in the Jurisdictional Statement filed in this case. That list is still accurate, except that (1) M.I.M. Holdings, Ltd., a company named therein, has acquired significant stock interests in Evans Deakin Industries Limited and Bush Pilots Airways, Ltd., two publicly owned Australian companies, and (2) appellant sold 30% of its stock in Geominerals, Inc. in October, 1981, thereby reducing its stock ownership to less than 100%.

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Books and Articles:

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Hellerstein, *Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business,* 21 Nat.Tax J. 487 (1968) 17, n.9

Janssen, *Tracking a Trend,* Wall St. J., Mar. 11, 1981, p. 56 .....48, n.42

Juch, D., "General Report on Unilateral Measures to Prevent Double Taxation," *Cahiers de Droit Fiscal International,* Vol. LXVI b, International Fiscal Association, XXXV Congress, Berlin (1981) ..45, n.38

Keesling and Warren, *The Unitary Concept in the Allocation of Income,* 12 Hastings L.J. 42 (1960). 15, n.8; 17, n.9

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Surrey, *Current Issues in the Taxation of Corporate Foreign Investment*, 56 Colum.L.Rev. 815 (1956).. 42

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No. 80-2015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appellee.*

Appeal from the Supreme Court of Idaho

BRIEF OF APPELLANT

OPINIONS BELOW

The second opinion of the Supreme Court of the State of Idaho (the "Idaho Supreme Court"), from which this appeal is now taken, is unofficially reported as *Am. Smelting & Refining* v. *Idaho St. Tax Com'n,* 624 P.2d 946 (Idaho 1981). That opinion simply reinstated, following a remand from this Court, the initial opinion of the Idaho Supreme Court which is reported as *Am. Smelting & Refining* v. *Idaho St. Tax Com'n,* 99 Idaho 924, 592 P.2d 39 (1979). Included as Appendix A to the Jurisdictional Statement[1]

[1] The Jurisdictional Statement filed in this case contains six appendices, herein referred to as "J.S.App.A" through "J.S. App. F." The pages in the six appendices are consecutively numbered. Where appropriate, references to these appendices will be followed by a page number indicating the location of the cited material in the appendices as a whole.

The separately bound joint appendix filed by the parties to this appeal will be referred to as the "J.A."

The three appendices attached to this brief will be referred to as "App.A, *infra*" through "App.C, *infra.*"

are copies of: the second opinion of the Idaho Supreme Court on remand from this Court (J.S.App.A 1a-2a); the order of this Court, which is reported at 445 U.S. 939 (1980), vacating the first judgment of the Idaho Supreme Court and remanding the case for further consideration (J.S.App.A 3a); the first opinion of the Idaho Supreme Court (J.S.App.A 4a-35a); the unreported Memorandum of the District Court of the Fourth Judicial District of the State of Idaho, Ada County (the "State District Court") (J.S.App.A 36a-37a); the unreported Findings and Conclusions of the State District Court (J.S.App.A 38a-45a); and the unreported Decision of the Idaho State Tax Commission (J.S.App.A 46a-62a).

JURISDICTION

On March 4, 1981, the Idaho Supreme Court rendered its second decision, from which this appeal is taken, upholding the constitutionality of the Idaho taxing statute as applied to appellant. This appeal was docketed within 90 days of that date on May 29, 1981. This Court noted probable jurisdiction on October 5, 1981. (J.A. 139a) This Court has jurisdiction under 28 U.S.C. § 1257(2); see *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Commerce Clause (Art. I, § 8, cl. 3):

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Due Process Clause (Amend. XIV, § 1):

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law;

Section 63-3027 of the Idaho Code ("I.C.") is set forth in J.S.App.D 67a-74a.

Sections 128A, 128B, and 221YL of the Income Tax Assessment Act 1936, as amended by Act No. 85, Acts of the Parliament of the Commonwealth of Australia (1967); and Articles 60 I and V, 61, 66, 73 I and 74 of the Income Tax Law of Mexico, as in effect in the years 1968-1970, are set forth in App. A, *infra*.

STATEMENT OF THE CASE

ASARCO Incorporated, the appellant, is engaged in the business of mining, smelting, refining, and selling nonferrous metals (hereinafter referred to as appellant's "Unitary Business"). Appellant is incorporated in New Jersey, maintains its headquarters or "commercial domicile" in New York, and conducts business in a number of other States, including Idaho. Appellant's principal business in Idaho is mining silver. In addition, appellant mines lead and zinc, operates the administrative office for its northwest mining division, and sells small amounts of secondary metals in Idaho. Appellant's smelting, refining, and other activities are conducted elsewhere. (J.S.App.A 39a-41a; J.A. 54a)

During the years in issue, 1968 through 1970, appellant received sizable dividends from M.I.M. Holdings, Ltd. ("M.I.M."), General Cable Corporation ("General Cable"), Revere Copper and Brass, Incorporated ("Revere"), ASARCO Mexicana, S.A. ("Mexicana"), and Southern Peru Copper Corporation ("Southern Peru"). Appellant also received interest on Revere's convertible debentures, on a note received in connection with a prior sale of Mexicana stock, and on a note received in connection with a 1970 disposition of General Cable stock. In addition to the capital gain which appellant realized on the General Cable stock disposition, appellant realized capital gains in 1968 and 1969 on the sale of a small part of its M.I.M. stock. Appellant also received other income from intangibles during the years in issue. However, for purposes of this appeal, appellant is limiting its constitutional challenge to

Idaho's treatment of the foregoing dividends, interest, and capital gains.[2]

M.I.M. is a major publicly owned corporation engaged in mining, milling, smelting, and refining nonferrous metals. It does business both in Australia and in England. During the years in issue, appellant owned approximately 53% of the stock of M.I.M., with the balance of the stock being widely held. Appellant had no representatives on the M.I.M. Board of Directors and the two companies had no common directors or common officers. In addition, there were no significant business transactions between the two corporations. M.I.M. operated "entirely independently" of appellant and had only "minimal contact" with appellant. (J.S. App.A 8a, 43a; J.A. 34a, 40a, 132a-135a)

General Cable and Revere are engaged in the metal fabricating or manufacturing business which is a business not conducted by appellant. During the taxable years in issue, appellant owned approximately 34% of the stock of each of these corporations, but appellant had no representatives on their Boards of Directors, no common directors, and no common officers. An antitrust decree prohibited appellant from even voting its stock in these corporations. While both companies purchased substantial amounts of copper from appellant, the antitrust decree expressly prohibited appellant from selling copper to them at prices lower than those charged to competitors. As required by the antitrust decree, appellant ultimately disposed of its General Cable stock. Following this disposition in 1970, appellant continued to sell copper to General Cable on the same basis as it had previously. (J.S.App.A 8a-9a, 39a; J.A. 35a, 40a, 50a, 135a-137a)

During the years involved, appellant owned 49% of the stock of Mexicana. Mexican law effectively prohibited the ownership of any greater percentage. Appellant did not control Mexicana or dictate its policy; Mexicana acted in-

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[2] A schedule showing all of appellant's dividends, interest income, and capital gains during the years in issue is set forth at J.A. 51a-53a.

dependently of appellant. There were no common officers of the two companies. While Mexicana was engaged in the same general line of business as appellant, the only intercompany sales between the two corporations were some spot purchases of concentrates by appellant from Mexicana. Appellant also performed some miscellaneous technical services for Mexicana, but appellant was compensated for these services on an arm's length basis. (J.S.App.A 9a-10a, 43a; J.A. 128a-132a)

During the years involved, appellant owned 51.5% of the stock of Southern Peru, but, pursuant to the terms of an agreement with the other shareholders of Southern Peru, appellant could not exercise control of the corporation. Under the agreement, which was incorporated in Southern Peru's by-laws, appellant could appoint only six of the 13 directors. Southern Peru was engaged in mining and smelting copper in Peru. Approximately 35% of the copper it produced was sold to appellant. The remaining production was sold to various buyers—30% to buyers in Europe and the balance to the other shareholders. All of the sales were made at arm's length prices. Southern Peru had its own operating staff and appellant received a fee for the incidental technical services which it provided. (J.S.App.A 7a-8a, 43a; J.A. 121a-128a)

The parties stipulated that M.I.M., Mexicana, and Southern Peru made no sales or purchases in Idaho, had no representatives or agents in Idaho, and conducted no business activity in Idaho during the years in issue. (J.A. 49a) There was no evidence or assertion that General Cable or Revere conducted any business in Idaho.

In filing its Idaho tax return for 1969 and 1970, appellant apportioned its operating business income between sources within and without Idaho on the basis of the three-factor formula prescribed pursuant to I.C. § 63-3027. See J.S. App.D 71a-73a.[3] This three-factor formula attributed to

[3] For 1968, appellant reported its Idaho tax using a separate accounting, rather than an apportionment, method. (J.A. 26a)

Idaho that fraction of appellant's total "business income" which was the average of the ratios of appellant's tangible property, payroll, and sales in Idaho to its total tangible property, payroll, and sales everywhere. Appellant did not include any of the dividends, interest, or capital gains in issue here in its apportionable business income.[4] As a result, appellant's Idaho taxable income for 1969 and 1970 was reported as $419,876 and $127,755, respectively. (J.A. 105a, 113a)

In 1971, the Multistate Tax Commission ("MTC") completed an audit of the years involved on behalf of Idaho and five other States. The MTC auditor made several significant adjustments. First, pursuant to I.C. § 63-3027(s) (J.S.App.D 73a), the MTC auditor treated appellant and six of its wholly owned subsidiaries as a single corporation and determined appellant's Idaho taxable income accordingly. Under this combined apportionment method, the incomes and apportionment factors of all of the combined corporations were taken into account and dividends paid by the six subsidiaries were disregarded. (J.S.App.A 6a)

The MTC auditor also determined that all of appellant's other dividends, together with its interest and capital gains, were includable in appellant's apportionable business income. The combined effect of all of the auditor's adjustments was to increase appellant's Idaho taxable income to $2,274,750 in 1969 and $2,162,346 in 1970. Because appellant's dividends, interest, and capital gains were so large, the major portion of the auditor's adjustment was attributable, in each instance, to the inclusion of those items in apportionable business income. (J.S.App.A 6a-11a; J.A. 67a, 75a)

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[4] Appellant also excluded certain other income from intangibles. The Idaho Supreme Court held (J.S.App.A 24a-25a) that some of those other items were apportionable, and appellant has not appealed with respect to those items.

Appellant challenged the inclusion of the dividends, interest, and capital gains in its apportionable business income on both statutory and constitutional grounds.[5] The Idaho State Tax Commission rejected both of these challenges. (J.S.App.A 53a-62a) The State District Court upheld appellant's statutory argument without reaching the constitutional issues. (J.S.App.A 36a-37a, 44a-45a) The Idaho Supreme Court reversed, however, rejecting most of appellant's statutory arguments[6] (J.S.App.A 12a-26a) and all of its constitutional arguments (J.S.App.A 26a-33a). Appellant appealed to this Court, which vacated the judgment of the Idaho Supreme Court and remanded the case "for further consideration in light of" *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980). (J.S.App.A 3a) On remand, however, the Idaho Supreme Court simply reinstated its first opinion. (J.S.App.A 1a-2a) Accordingly, appellant appeals for the second time to this Court.

SUMMARY OF ARGUMENT

1. *Exclusion of Dividends from Apportionable Income:* Prior decisions of this Court permit a nondomiciliary State to use a formulary apportionment method to determine the income tax liability of a corporation doing business both inside and outside the State. However, this approach is permissible only if and to the extent that the income being apportioned is derived from a "unitary business" in which the activities being conducted outside the taxing State are functionally integrated with the activities being conducted inside the State.

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[5] Initially, appellant also challenged the auditor's use of combined reporting. That issue, however, was resolved against appellant at the trial level, was not appealed, and is no longer in the case.

[6] The Idaho Supreme Court did hold that a small portion of appellant's dividend income constituted nonbusiness income which was not subject to apportionment under the Idaho Code. (J.S. App.A 23a)

In such cases, the State is permitted to tax a fairly determined fractional part of the total income earned by the enterprise as a whole, because there may be no other way of identifying and separately accounting for the profits generated by the activities within the taxing State. However, where there are operations outside the taxing State which are functionally discrete, and can therefore be separately accounted for, apportionment with respect to those operations is neither necessary nor appropriate. If the out-of-state activities do not contribute in some meaningful way to the production of income within the State, the State has no legitimate interest in taxing *any* portion of the income earned from those out-of-state activities.

In *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), the Court made it clear that the foregoing "functional integration" test applies to dividends which a corporation doing business within the State receives from other corporations operating exclusively outside the State. Under *Mobil*, the dividends may be included in the apportionable income of the recipient only if the out-of-state activities of the payor are so closely related, in a functional sense, to the in-state activities of the recipient that all of those activities constitute a single "unitary business."

In the present case, the dividends, interest, and capital gains which appellant received from its long-term investments in five out-of-state corporations were not properly includable in appellant's apportionable income for Idaho tax purposes because all five corporations were independently managed, separately operated, free-standing concerns. Several of them had no significant business dealings with appellant, and those that did were customers or suppliers who dealt with appellant on the same arm's length basis as appellant dealt with other third parties. The profits earned by the five companies and distributed to appellant had nothing to do with appellant's Idaho activities and should therefore not be included in the Idaho tax calcula-

tion. Appellant's interest income and capital gains stand on the same conceptual footing and should be excluded from apportionable income for the same reasons.

2. *Modification of Apportionment Factors:* If this Court nevertheless holds that any or all of the foregoing dividends, interest, or capital gains may constitutionally be included in appellant's apportionable business income, the Idaho tax will still contravene the Due Process Clause, and also the Foreign Commerce Clause, unless Idaho adjusts its regular apportionment formula to reflect the out-of-state property, payroll, and sales which generated the profits being included in appellant's apportionable income base.

In *Mobil*, this Court held that the apportionability of income the taxpayer receives from unitary business activities should not be affected by whether the income comes in the form of divisional profits or dividends from legally separate entities. This Court stated (445 U.S. at 441) that transforming divisional profits into dividends "works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives."

If the income which appellant received in the form of dividends from corporations operating outside Idaho had constituted profits of unitary divisions being operated by appellant outside Idaho, there is no question that the out-of-state property, payroll, and sales of the divisions would have been taken into account in appellant's apportionment factors. Idaho's failure to reduce the apportionment fraction to reflect out-of-state property, payroll, and sales of the dividend-paying corporations violates the Due Process Clause because it inevitably overstates the portion of appellant's total income which is attributable to its Idaho property, payroll, and sales.

Idaho's failure to adjust the apportionment factors also violates the Foreign Commerce Clause by permitting Idaho to impose a direct tax on foreign-source investment income that has already been taxed by foreign governments. In

accordance with international custom, the laws and treaties of this Nation explicitly provide that the Federal Government will avoid double taxation of foreign-source investment income by allowing United States taxpayers to credit their foreign tax payments on such income against their federal tax liability. Consequently, Idaho's failure to use some mechanism that will avoid double taxation at the state level prevents this Nation from speaking with one voice in matters affecting commercial relations with foreign countries.

ARGUMENT

I. UNDER *MOBIL*, IDAHO'S INCLUSION OF THE DIVIDENDS, INTEREST, AND CAPITAL GAINS IN APPELLANT'S APPORTIONABLE BUSINESS INCOME CONTRAVENES THE DUE PROCESS CLAUSE.

Because it operates a mine and has an office in Idaho, appellant agrees that it is subject to tax in Idaho on that portion of the income from its Unitary Business which is properly attributable to its Idaho activities. Appellant also agrees that Idaho may use a formulary apportionment method (rather than separate accounting) to determine the portion of appellant's Unitary Business income which is properly attributable to its Idaho activities. *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980) (hereinafter "*Mobil*"); *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978). Appellant submits, however, that, under the Due Process Clause, the dividends, interest, and capital gains at issue here may not be included in the Unitary Business income which is subject to apportionment.

A. This Court's Decision in *Mobil*.

The threshold issue in *Mobil* was whether, under the Due Process Clause, a nondomiciliary State (Vermont) could constitutionally tax (by inclusion in apportionable income) certain dividends received by a resident corporation (Mo-

bil) from nonresident payor corporations having no contact with the taxing State.[7] Although the record in the *Mobil* case failed to provide much detail, this Court made the key finding that (445 U.S. at 435):

> [I]t is apparent, from perusal of such documents in the record as appellant's corporate reports for the years in question, that many of these subsidiaries and affiliates, including the principal contributors to appellant's dividend income, engage in business activities that form part of Mobil's integrated petroleum enterprise. Indeed, although appellant is unwilling to concede the legal conclusion that these activities form part of a "unitary business," see Reply Brief for Appellant 2, n. 1, it has offered no evidence that would undermine the conclusion that most, if not all, of its subsidiaries and affiliates contribute to appellant's worldwide petroleum enterprise.

On this basis, this Court upheld Vermont's power to include the dividends paid by these subsidiaries and affiliates in Mobil's apportionable income, stating (445 U.S. at 439):

> [T]he linchpin of apportionability in the field of state income taxation is the unitary-business principle. In accord with this principle, what appellant must show, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State. *Bass, Ratcliff & Gretton* [266 U.S. 271 (1924)] forecloses the contention that the foreign source of the dividend income alone suffices for this purpose. Moreover, appellant has made no effort to demonstrate that the foreign operations of its subsidiaries and affiliates are distinct

[7] As used hereinafter, the term "resident" corporation means a corporation which is doing business within the taxing State, but is organized under the laws of some other State and has its headquarters or commercial domicile in some other State. Since appellant has its legal domicile in New Jersey and its commercial domicile in New York (J.A. 54a), and does business in Idaho, appellant is a resident of Idaho.

> in any business or economic sense from its petroleum sales activities in Vermont. Indeed, all indications in the record are to the contrary, since it appears that these foreign activities are part of appellant's integrated petroleum enterprise. [Footnote deleted.]

This Court also stressed that the form of business organization should have no impact on the outcome, stating (445 U.S. at 440-441):

> Nor do we find particularly persuasive Mobil's attempt to identify a separate business in its holding company function. So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.
>
> Superficially, intercorporate division might appear to be a more attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise. Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441 (1964). Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives. [Footnote deleted.]

In addition, at a later point in the opinion, the Court explicitly confirmed that it had based its decision on the relationship between Mobil's activities and those of the payor corporations, stating (445 U.S. at 442):

> Where the business activities of the dividend payor have nothing to do with the activities of the recipient

in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business. We need not decide, however, whether Vermont's tax statute would reach extraterritorial values in an instance of that kind. Cf. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S., at 121. Mobil has failed to sustain its burden of proving any unrelated business activity on the part of its subsidiaries and affiliates that would raise the question of nonapportionability. [Citations and footnote deleted.]

B. Under the "Unitary Business" Test of *Mobil*, the Issue Is Whether the Activities of the Dividend-Paying Corporation and Those of the Recipient in the Taxing State Are Part of a Single Functionally Integrated Business.

The foregoing quotations from the Court's opinion make it plain that the unitary business test adopted in *Mobil* is whether the "underlying activity"—that is, the *business activity of the dividend-paying corporation*—is part of a "functionally integrated enterprise" being conducted, in part, by the recipient corporation in the taxing State. In other words, the test is whether the activities of the dividend-paying corporation and the activities of the recipient in the taxing State are part of the same functionally integrated, unitary business.

The reason for this "functional integration" requirement becomes obvious when one bears in mind the purpose of formulary apportionment. As this Court has recognized on many occasions, the need for formulary apportionment arises in cases such as this because of (1) the constitutional requirement that a nondomiciliary State tax only the income from the resident corporation's in-state activities, and (2) the difficulty in determining such income where the resident corporation conducts an integrated, unitary business both within and without the taxing State. See, *e.g.*, *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, *supra* (integrated petroleum business); *Mobil*, (integrated petroleum business); *Moorman Mfg. Co.* v. *Bair*, *supra* (integrated

manufacture and sale of animal feeds); *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942) (integrated wholesale business); *Bass, Ratcliff & Gretton* v. *State Tax Commission*, 266 U.S. 271 (1924) (integrated manufacture and sale of ale); and *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920) (integrated manufacture and sale of typewriters). In such cases, the State is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders." *Underwood Typewriter Co.* v. *Chamberlain, supra*, 254 U.S. at 121. But such allocation is "impossible" only where the in-state and out-of-state activities are so closely tied together that the income is earned by the entire enterprise as a unit; in such cases, as this Court noted in *Mobil* (445 U.S. at 438):

> [S]eparate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. *Butler Bros.* v. *McColgan*, 315 U.S., at 508-509. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable "source."

By comparison, where two activities of a corporation, or the activities of a parent corporation and its subsidiary, are functionally discrete, separate accounting will suffice to determine the income from each separate activity and there is no need for apportionment.

The foregoing analysis has been uniformly recognized by this Court in its apportionment decisions. For example, in *Adams Express Co.* v. *Ohio State Auditor*, 165 U.S. 194 (1896), the Court noted that unity of ownership alone was insufficient to justify apportionment, stating (165 U.S. at 222):

> The same party may own a manufacturing establishment in one state and a store in another, and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store, or *vice versa*, nor is

> the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership.

By comparison, where the store sells the products manufactured by the factory, the operations of the two become functionally integrated and apportionment is appropriate. Thus, in *Bass, Ratcliff & Gretton* v. *State Tax Commission, supra*, this Court stated (266 U.S. at 282):

> So in the present case we are of the opinion that, as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions, beginning with the manufacture in England and ending in sales in New York and other places,—the process of manufacturing resulting in no profits until it ends in sales,—the state was justified in attributing to New York a just proportion of the profits earned by the company from such unitary business.

Similarly, apportionment may be appropriate where there is horizontal rather than vertical integration. See, *e.g.*, *Butler Bros.* v. *McColgan, supra*, where wholesale stores in several States were operated in an integrated fashion by utilizing a central buying division, a central advertising division, and centralized executive management.[8]

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[8] Keesling and Warren, in their article *The Unitary Concept in the Allocation of Income*, 12 Hastings L.J. 42, 50-52 (1960), refer to vertical integration as "operational unity" and horizontal integration as "economic unity." It is clear that the authors believe separate activities will comprise a "business" only if one of these two unities is present. As we have done above, they relate this definition of a "business" to the circumstances where income apportionment is appropriate. Thus, they conclude (p. 49):

> Briefly stated, for the purposes of allocation of income, a business may be defined as a separately owned group of activities each of which contributes to the production or earning of a given identifiable item of income, no portion of which can be segregated and specifically identified as being attributable to any one of the activities or any combination of activities less than the total number included in the group.

Thus, to qualify as a unitary business, the activities involved must constitute a *functionally integrated enterprise which earns its income as a unit or a whole,* thereby justifying apportionment. In accordance with this principle, many of the cases involving dividend income have recognized that apportionability turns on the functional relationship between the activities of the payor and recipient corporations. In addition to *Mobil,* see also *F. W. Woolworth Co.* v. *State of Alaska, Department of Revenue* (Alaska Sup. Ct. Oct. 29, 1981); *Square D Co.* v. *Kentucky Board of Tax Appeals,* 415 S.W.2d 594 (Ky. 1967); *Gulf Oil Corp.* v. *Clayton,* 267 N.C. 15, 147 S.E.2d 522 (1966); *American Bakeries Co.* v. *Johnson,* 259 N.C. 419, 131 S.E.2d 1 (1963); and *Marshall-Wells Co.* v. *Commissioner of Taxation,* 220 Minn. 458, 20 N.W.2d 92 (1945).

The recent *Woolworth* case, *supra,* is squarely in point. There, as here, a parent corporation doing business in the taxing State received dividends from subsidiaries conducting similar businesses in foreign countries. In accordance with *Mobil,* the Alaska Supreme Court expressly held in *Woolworth* that "the business from which the dividends are derived must be part of the unitary business being taxed in order for the dividends to be apportioned." (Slip Op. 2)

In *Square D Co.* v. *Kentucky Board of Tax Appeals, supra,* a parent corporation doing business in Kentucky received dividends from two wholly owned subsidiaries conducting the same type of business in Canada and Mexico. In recognition of the constitutional limitations on state taxation, the court concluded that the Kentucky statute should be construed to prevent the State from including the dividends in the parent's apportionable income. In so holding, the court stated (415 S.W.2d at 602):

> No part of the . . . Canadian or Mexican incomes can be said to have been derived from Kentucky operations unless the apparently independent foreign activities were so integrated and interrelated with those

> in Kentucky that the separate sources cannot be reasonably and separately identified. We do not think this can be said of any of the dividend . . . income here in controversy.

Over the years, a number of other tests for determining the scope of a unitary business have been formulated by the courts.[9] In cases involving the apportionment of dividends, several courts have looked to the "overall size and financial power" which the parent corporation derived from its ownership of the stock of the subsidiaries. *F. W. Woolworth Co.* v. *Director of Div. of Taxation*, 45 N.J. 466, 213 A.2d 1, 14 (1965); *Taxation & Revenue Dept., etc.* v. *F. W. Woolworth*, 95 N.M. 519, 624 P.2d 28 (1981).

In the New Jersey case, the court stated (213 A.2d at 14):

> We know of no United States Supreme Court case holding or even intimating that . . . close functional integration [of the type involved in *Butler Bros.* v. *McColgan, supra*] is a *sine qua non* for a finding of a unitary enterprise. . . .

In *Mobil*, this Court stated (445 U.S. at 440) that dividends may be apportioned "[s]o long as . . . [they] reflect profits derived from a functionally integrated enterprise. . . ." Thus, it is obvious that the New Jersey court's decision—and other prior state court decisions like it—no longer have any vitality.

In its Motion to Dismiss, appellee states (pp. 6-7) that we are misreading *Mobil*, and asserts that attention must be focused on appellant's *own* activities to determine whether appellant's income-producing investments are suf-

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[9] See, *e.g.*, the cases discussed in Keesling and Warren, *op. cit.*, n. 8, *supra*, at 45-52; Hellerstein, *Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business*, 21 Nat.Tax J. 487, 496-501 (1968). See also *Mobil*, 445 U.S. at 439, n. 14 and 443, n. 17.

ficiently related to appellant's other business activities to form part of its Unitary Business. There may be situations, not considered in *Mobil* and not present here, in which it would be appropriate to focus only on the taxpayer's own activities, without regard to the underlying activities of the company paying the dividends.[10] But where, as here, there is no evidence suggesting that the taxpayer's business consists of, or necessarily involves, securities investments, there is no basis under *Mobil* for treating the dividend income as part of the taxpayer's unitary business income unless the underlying business activities generating that income are functionally integrated with the taxpayer's business activities. We shall now show that this type of functional relationship does not exist in the present case.

C. Application of the *Mobil* "Functional Integration" Test to This Case.

To place appellant's constitutional objections in proper perspective, we think it is helpful to focus on the wide range of activities which concededly form part of appellant's Unitary Business. Because it operates a silver mine in Idaho and has an administrative office there, appellant has voluntarily recognized that *all* of its operating income attributable to mining, smelting, refining, and selling nonferrous metals should be included in its Unitary Business income for Idaho apportionment purposes. Appellant's principal product is copper. (J.S.App.A 39a) Since it engages in no copper operations in Idaho (see J.S.App.A 40a), it could plausibly argue that none of its copper receipts or facilities should be reflected in the Idaho apportionment calculation. However, in recognition of the way

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[10] For example, if the taxpayer is a securities dealer or underwriter, it may be constitutionally permissible for a State to treat the taxpayer's dividend and interest income from securities held in inventory as apportionable business income.

in which its various ores and concentrates actually flow through the system and the coordinated way in which its overall metals operations are managed, appellant has treated all of its metals operations as "functionally integrated," with the result that Idaho may take into account the proceeds derived from copper mined in Arizona, smelted in Washington, refined in Maryland, and sold in New York.

We believe that this broad definition of appellant's Unitary Business—a definition which includes *every* phase of appellant's operations from exploration to the sale of the refined metals—fairly compensates Idaho for the benefits appellant receives from the State. Cf. *Exxon Corp.* v. *Wisconsin Dept. of Revenue, supra; Mobil.* What appellant strenuously objects to is Idaho's attempt to reach out and tax appellant's income from investments in independently managed, free-standing companies conducting operations largely unrelated to appellant's domestic metals business.

1. *M.I.M.:* The decision below with respect to the dividends appellant received from M.I.M. is perhaps the clearest example of overextending the State's taxing jurisdiction. The record shows that M.I.M. is a major, publicly held Australian mining corporation with thousands of employees. (J.A. 132a-133a) The State District Court correctly found that M.I.M. operated "entirely independently of" appellant and had only "minimal contact with" appellant. (J.S.App.A 43a)[11] Nor did appellant exercise any control over M.I.M.'s management. During the years involved here,

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[11] During the three years here involved, M.I.M. made sales to appellant which averaged approximately .8 of 1% of M.I.M.'s total sales and M.I.M. paid royalties of approximately $30,000 per year to appellant with respect to a licensed patent. (J.A. 43a, 45a, 47a, 51a) Given the magnitude of M.I.M.'s operations, and the lack of any participation by appellant in M.I.M.'s business at either the operational or management level (J.A. 132a-134a), these transactions are simply not significant. Even the MTC auditor recognized this. (J.A. 83a, 91a)

appellant owned approximately 53% of M.I.M.'s stock, but appellant had *no* representatives on the M.I.M. Board of Directors and the two companies had *no* common directors or officers. (J.A. 34a, 40a, 132a)

In holding that the dividends from M.I.M. constituted apportionable business income, the Idaho Supreme Court stated (J.S.App.A 22a-23a):

> We recognize that M.I.M., for the years in question, seems to have operated independently of ASARCO and did little if any business with ASARCO. Although ASARCO owns a controlling interest in M.I.M., ASARCO did not exercise its right to control the corporation, apparently for political reasons. Nevertheless, ASARCO does own a majority of M.I.M. stock and M.I.M. is engaged in virtually the same business as ASARCO. Given these facts and the statutory presumption we conclude that the trial court erred in concluding that ASARCO's interest in M.I.M. was merely a passive investment unrelated to ASARCO's mining and smelting business.

Thus, the decision below would permit the taxation of dividend income received from out-of-state sources if the resident corporation receiving the dividend owns a "controlling" stock interest in the nonresident payor corporation and both corporations are in "virtually the same business." Taxation would be permitted even though (1) the recipient corporation admittedly "did not exercise its right to control" the payor corporation; (2) the payor corporation "operated independently of" the recipient corporation; and (3) the two corporations "did little if any business" with each other. Such a result is clearly contrary to *Mobil*.

The controlling factors under *Mobil* are the absence of any participation by appellant in the management or operation of M.I.M., and the absence of any significant business dealings between them. Under these circumstances, it is clear that the requisite functional integration is missing.

M.I.M. ran its *own* business; appellant was simply a passive investor. There is no reason why Idaho should be permitted to tax *any* portion of the profits generated by a foreign mining operation having no functional or other relationship to any business being conducted in Idaho.

2. *General Cable and Revere:* Neither of these corporations was even in the same business as appellant. Both were engaged in fabricating metal products. General Cable manufactured and sold cables; Revere manufactured and sold copper wares. (J.A. 50a) By contrast, appellant's Unitary Business consisted of the mining, smelting, refining, and selling of nonferrous metals, including copper, in bulk form. Appellant produced some metal alloys, but it did not manufacture *any* copper products or other metal products. (J.S.App.A 39a-40a; J.A. 83a-84a)

General Cable and Revere were customers of appellant. However, they also purchased copper from other suppliers,[12] and their business dealings with appellant were conducted on a strictly arm's length basis. Indeed, under a consent decree signed in connection with an antitrust proceeding, appellant was expressly prohibited from selling copper to them at prices lower than those charged to their competitors. (J.S.App.A 9a; J.A. 96a) The decree also required appellant to dispose of all of its General Cable stock. Following this disposition in 1970, General Cable continued as a customer of appellant on the same basis as it had previously. (J.A. 137a) In addition, both General Cable and Revere were publicly held and independently managed. Appellant only owned approximately 34% of their stock, and, under the consent decree, appellant was prohibited from voting this stock or maintaining any common officers or directors. (J.S.App.A 8a-9a; J.A. 135a) Thus, appellant had absolutely no voice in the management

[12] In addition, appellant sold its output to other customers. The purchases by General Cable and Revere accounted, in round numbers, for only 6% and 3%, respectively, of appellant's total sales during the period in issue. (J.A. 27a)

of either General Cable or Revere during the years in question. (J.A. 35a, 40a)

There is nothing in these circumstances to warrant treating the manufacturing activities of General Cable or Revere as part of appellant's mining, smelting, and refining business. The sale of a product by one independently managed corporation to another on an arm's length basis is the most common sort of transaction. If both corporations could be treated as being engaged in the same unitary business by reason of such sales, virtually the entire United States economy would constitute a single unitary business. Obviously more is required.

As discussed above, the issue here is to determine appellant's Idaho taxable income earned from its Idaho activities. That is all Idaho can tax. Any benefits which inure to Idaho as a result of appellant's sales to General Cable and Revere are sufficiently reflected by the inclusion of the proceeds from those sales in the apportionable income of appellant's separate Unitary Business. Because appellant conducted no manufacturing operations of its own, either in Idaho or elsewhere, there is no reason to take the further step of redefining its Unitary Business to include General Cable's and Revere's independently managed manufacturing operations and to apportion the income from those operations as well.[13]

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[13] Nor should it make any difference that General Cable and Revere both used appellant's stock transfer department or that Revere used a patent of appellant's for a fee. (J.A. 136a) Those intercompany transactions are simply too inconsequential to make any difference. They are comparable to the situation in *Commonwealth* v. *Advance-Wilson Industries, Inc.*, 456 Pa. 200, 317 A.2d 642 (1974), where a ceramic tile business and electrolyzing business, which were run as separate divisions of a single company, were held to be separate businesses. It did not matter that the home office performed certain administrative and other functions for both divisions.

3. *Mexicana:* Appellant owned only 49% of Mexicana's stock and accordingly did not exercise control over Mexicana. The name "ASARCO Mexicana" stems from a prior period when appellant owned 100% of the stock of Mexicana's predecessor. By the years in issue, however, such ownership was effectively prohibited by Mexican law, and Mexicana operated independently of appellant. There were no common officers of the two companies. (J.A. 128a-130a)

Moreover, although appellant and Mexicana were engaged in the same type of business, their businesses were not functionally integrated. The business relationship between them was limited to some services which appellant provided for a fee and some spot purchases of copper by appellant. (J.S.App.A 9a-10a; J.A. 130a-131a) As discussed above, limited intercompany transactions of this sort are simply too minor to make Mexicana's activities part of appellant's Unitary Business.

4. *Southern Peru:* Southern Peru mines and smelts copper in Peru, and sells the resulting "blister copper" to appellant, three other mining companies, and unrelated European customers. Although appellant owns 51.5% of Southern Peru's stock, the company's by-laws provide that appellant cannot exercise control through the directors it elects. Southern Peru has its own staff, although appellant furnishes it with certain technical services for a fee. (J.S. App.A 7a; J.A. 121a-124a)

While appellant purchases roughly 35% of Southern Peru's blister copper production pursuant to a long-term supply contract (J.S.App.A 7a), this does not mean that Southern Peru's business must be viewed as part of appellant's Unitary Business. There may be cases, as suggested by the MTC at p. 15 of its *amicus* brief in support of appellee's Motion to Dismiss, where a stock investment in an important supplier or customer can appropriately be treated as a "business" asset of the taxpayer so that dividends received with respect to that stock are part of the taxpayer's unitary business income. But in deciding

whether this treatment is proper, the test should be no different from that applied with respect to any other stock investment. In each instance, the critical question is whether the activities of the taxpayer and the other corporation are so closely interrelated that the income attributable to the taxpayer's activities in the taxing jurisdiction cannot be fairly determined without taking into account income from the activities performed by the other corporation outside the taxing jurisdiction.

Judged by that standard, the dividends which appellant received from Southern Peru do not belong in the Idaho tax calculation. Southern Peru was not a captive mine which shipped all or substantially all of its output to appellant under circumstances making it difficult to separately account for the two companies' respective incomes. Cf. *Exxon Corp.* v. *Wisconsin Dept. of Revenue, supra,* 447 U.S. at 224-225, 226, involving "a highly integrated business which benefits from an umbrella of centralized management and controlled interaction."[14] On the contrary, it was perfectly possible to determine Southern Peru's separate income in an accurate, reliable fashion because the sales made to appellant were made on the same arm's length basis and at the same average prices which appellant paid to other *completely unrelated* suppliers who sold copper to appellant under

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[14] Moreover, there was undisputed testimony establishing that the supply contract was not "necessary" to appellant, and could probably be "replaced . . . [w]ithin a short time" with copper from other sources. (J.A. 128a) There was also undisputed testimony to the effect that loss of appellant's stock investment in Southern Peru would not result in loss of the supply contract. (*Ibid.*) Thus, while Southern Peru was an "important" source of supply (*ibid.*), the supply contract was by no means a necessary or integral part of appellant's Unitary Business. More fundamentally, the sales by Southern Peru to appellant did not create a situation where Idaho would be "faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders." *Underwood Typewriter Co.* v. *Chamberlain, supra,* 254 U.S. at 121.

long-term output contracts. (J.A. 125a-127a) Where, as here, there is uncontradicted evidence establishing that the taxpayer has dealt with an affiliated supplier on the same arm's length basis as it has dealt with "many" other suppliers "in which [it] has no interest" (J.A. 126a, 127a), the profits made by the affiliated supplier are no more a part of the taxpayer's unitary business income than the profits made by the unrelated suppliers. Consequently, dividends paid out of the affiliated supplier's profits are not apportionable.

D. Appellant's Interest and Capital Gains Are Not Apportionable Income.

Mobil involved only dividend income; the present case also involves interest income and capital gains attributable to appellant's investments in the dividend-paying corporations.

There are many cases in which state courts have considered whether a resident corporation's interest income or capital gains from intangibles are sufficiently related to the corporation's activities within the taxing State to justify apportionment under local law.[15] Interest from short-term investments of operating income has generally been apportioned.[16] Interest income derived from loans regularly made to affiliated corporations engaged in a related business has also been held apportionable.[17] On the other hand, interest

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[15] See, *e.g.*, *Qualls* v. *Montgomery Ward & Co., Inc.*, 266 Ark. 207, 585 S.W.2d 18 (1979); *Atlantic Richfield Co.* v. *State*, 191 Colo. 413, 601 P.2d 628 (1979); *Champion International Corp.* v. *Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (Ct.App. 1975); *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 129 N.E. 202 (1920).

[16] *Great Lakes Pipe Line Co.* v. *Commissioner of Taxation*, 272 Minn. 403, 138 N.W.2d 612 (1965); *Montgomery Ward & Co. Inc.* v. *Commr. of Taxation*, 276 Minn. 479, 151 N.W.2d 294 (1967); *Champion International Corp.* v. *Bureau of Revenue, supra.*

[17] *Qualls* v. *Montgomery Ward & Co., Inc., supra.*

from long-term securities has been held nonapportionable.[18] Cases involving capital gains from the sale of intangible assets used in the business have been somewhat inconsistent. Gain from the sale of stock investments has been treated as apportionable income in some cases,[19] but not in others.[20] Gain from the sale of leases has also been treated as apportionable in some cases,[21] but not in others.[22]

In the present case, appellant has not contested Idaho's right to treat interest income from temporary deposits of appellant's working capital funds as apportionable business income derived in the ordinary course of appellant's Unitary Business activities. However, appellant firmly believes that Idaho has no constitutional right to tax any portion of the interest income or capital gains which appellant realized from its long-term investments in M.I.M., General Cable, Revere, and Mexicana.[23]

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[18] *Sperry & Hutchinson* v. *Dept. of Rev.*, 270 Ore. 329, 527 P.2d 729 (1974).

[19] See, *e.g.*, *W. R. Grace & Co.* v. *Commissioner of Rev.*, 378 Mass 577, 393 N.E. 2d 330 (1979); *Commonwealth* v. *Emhart Corporation*, 443 Pa. 397, 278 A.2d 916, *cert. denied*, 404 U.S. 981 (1971).

[20] See, *e.g.*, *Commonwealth* v. *ACF Industries*, 441 Pa. 129, 271 A.2d 273 (1970), where the gain was not apportioned because the activities of the company whose stock was sold were unrelated to the activities of the seller in the taxing State.

[21] See, *e.g.*, *Tipperary Corp.* v. *New Mexico Bur. of Rev.*, 93 N.M. 22, 595 P.2d 1212 (1979).

[22] See, *e.g.*, *Western Natural Gas Co.* v. *McDonald*, 202 Kan. 98, 446 P.2d 781 (1968).

[23] The interest income in dispute consists of interest received in connection with the 1970 disposition of General Cable stock, interest on Revere convertible debentures, and interest on a note received in connection with a prior sale of Mexicana stock. The capital gains in issue consist of gains realized by appellant on the sale of part of its long-term stock investment in M.I.M. and the disposition of all of its stock investment in General Cable. (See J.A. 51a, 53a; Juris. Statement 4-5)

For constitutional purposes, the interest income and capital gains from appellant's investments in the foregoing companies should be excluded from appellant's apportionable business income for the same reasons that appellant's dividend income from those companies is excludable. The capital gains, interest, and dividends all stand on the same tax footing because they all stem from long-term capital investments in the stock or securities of out-of-state companies whose businesses are functionally distinct from appellant's Unitary Business. Because *none* of the investment income was generated directly or indirectly by any activities even remotely connected with appellant's Idaho activities, there is no reason why Idaho should be permitted to tax *any* portion of that income.

II. ALTERNATIVELY, EVEN IF SOME PORTION OF THE DIVIDENDS, INTEREST, AND CAPITAL GAINS MAY CONSTITUTIONALLY BE INCLUDED IN APPELLANT'S APPORTIONABLE BUSINESS INCOME, BOTH THE DUE PROCESS CLAUSE AND THE FOREIGN COMMERCE CLAUSE WILL BE VIOLATED UNLESS A CORRELATIVE ADJUSTMENT IS MADE TO IDAHO'S APPORTIONMENT FACTORS.

A. The Due Process Clause.

The only Due Process Clause issue considered in *Mobil* was whether Mobil's dividend income from subsidiaries and affiliates could be included in Mobil's apportionable income. Because Mobil did not present the question, the Court expressly refrained from deciding whether the inclusion of such dividends in apportionable income would necessitate some correlative adjustment to Vermont's apportionment factors. See 445 U.S. at 434, 441, n. 15, and 449.

We have previously contended that, under the Due Process Clause, the dividends, interest, and capital gains in issue may not be included in appellant's apportionable business income. If, however, the Court holds that any of

those items may be included in appellant's apportionable income, correlative adjustments to Idaho's apportionment factors will be required to satisfy the requirements of the Due Process Clause. Unless the apportionment factors are adjusted, the method used by Idaho will be "inherently arbitrary." See *Underwood Typewriter Co.* v. *Chamberlain, supra,* 254 U.S. at 121; *Bass, Ratcliff & Gretton* v. *State Tax Commission, supra,* 266 U.S. at 282-283.

Although the Court did not reach the issue in *Mobil,* Mr. Justice Stevens stated in his dissent (445 U.S. at 461):

> Unless the sales, payroll and property values connected with the production of income by the [dividend] payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will *inevitably* cause Mobil's Vermont income to be overstated. [Footnote deleted; emphasis supplied.]

The reason for Mr. Justice Stevens' conclusion is clear. Idaho, as a nondomiciliary State, can tax appellant only on that portion of its income which is attributable to appellant's activities in Idaho. In determining that amount, it should make no difference whether appellant's Unitary Business (whose income is being apportioned for this purpose) is conducted through divisions or separately incorporated subsidiaries. As this Court stated in *Mobil* (445 U.S. at 440-441):

> Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp.* v. *Washington,* 377 U.S. 436, 441 (1964). *Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.* [Footnote deleted; emphasis supplied.]

Thus, if the total amount of apportionable income in the parent-subsidiary case remains the same as it is where the parent operates through divisions, it follows that the share or percentage of that income properly apportionable to the taxing State also ought to remain the same. After all, the value of the activities carried on in the taxing State is not affected by the taxpayer's corporate structure any more than is the amount of the taxpayer's apportionable income.

However, the results of operating a unitary business through a subsidiary will *not* be the same as the results of operating through a division unless the apportionment formula is appropriately adjusted when dividends paid by the subsidiary are included in the taxpayer's apportionable income. This can be demonstrated by assuming that the taxpayer conducts a unitary business through two divisions (Division A, which operates both inside and outside Idaho, and Division B, which operates entirely outside Idaho). Assume the following figures:

	Division A		Division B	
	All Locations	Idaho Situs	All Locations	Idaho Situs
Property	$200,000	$20,000	$100,000	-0-
Payroll	300,000	30,000	150,000	-0-
Sales	400,000	40,000	200,000	-0-
Business Income	50,000		10,000	

On these facts, the income apportioned to Idaho will be $4,000, computed as follows:

Total Business Income = $50,000 + $10,000 = $60,000

Idaho Factors:

$$\left[\frac{\text{Property } 20{,}000}{300{,}000} + \frac{\text{Payroll } 30{,}000}{450{,}000} + \frac{\text{Sales } 40{,}000}{600{,}000}\right] \div 3 = \frac{1}{15}$$

$$\text{Idaho Taxable Income} = \$60{,}000 \times \frac{1}{15} = \$4{,}000$$

Now assume that the taxpayer retains the Division A business, but places the Division B business in a new wholly owned subsidiary. If all of the subsidiary's income is distributed as a dividend to the parent and included in apportionable business income, the results will be markedly different if there is no adjustment in the parent's apportionment factors. Under these circumstances, the income apportioned to Idaho will be increased by 50% to $6,000, computed as follows:

Parent's Business Income = $50,000 + $10,000 = $60,000

Parent's Idaho Factors:

$$\left[\underset{\text{Property}}{\frac{20{,}000}{200{,}000}} + \underset{\text{Payroll}}{\frac{30{,}000}{300{,}000}} + \underset{\text{Sales}}{\frac{40{,}000}{400{,}000}}\right] \div 3 = \frac{1}{10}$$

$$\text{Idaho Taxable Income} = \$60{,}000 \times \frac{1}{10} = \$6{,}000$$

The Idaho Supreme Court held that inclusion of the dividends in appellant's apportionable income did not require any adjustments in the apportionment factors. This conclusion stemmed from a misapprehension of the rationale for including the dividends in appellant's apportionable business income. It is apparent from the Idaho Supreme Court's opinion that the dividends were perceived to be apportionable income because of appellant's *own* activities (namely, the ownership of the stocks involved), rather than the activities of the dividend-paying corporations. See J.S.App.A 29a and the Idaho Supreme Court's reliance on *F. W. Woolworth Co.* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A.2d 402 (1974) and *F. W. Woolworth Co.* v. *Director of Div. of Taxation, supra.* Appellee has also adopted this approach by arguing in its Motion to Dismiss or Affirm (pp. 6-7, 16) that the dividend income represents appellant's own income from intangibles (not the income of the dividend-paying corporations) and, as such, can be taxed by Idaho.

It is now clear, however, from this Court's opinion in *Mobil*, that the inclusion of dividends in apportionable business income in a case like this depends on the underlying activities of the dividend-paying corporations—activities clearly carried on outside Idaho—and not on appellant's own activities. Thus, if the dividends are to be included in the apportionable base (as part of the procedure for determining what may be constitutionally taxed in Idaho), the apportionment factors must be correlatively reduced to reflect the property, payroll, and sales of the corporations whose businesses generated the dividends. Only in that way will the result be the same as it would have been if the businesses conducted by those corporations had been conducted directly in divisions of appellant. As the above example demonstrates, failure to reduce the apportionment fractions results in a *gross* overstatement of the portion of the unitary business income which is properly attributable to the taxing State and *penalizes* the taxpayer for operating through a subsidiary rather than a division.

Indeed, as recently conceded by the Executive Director of the MTC, failure to adjust the apportionment fractions in a case like the present one "produces a still higher tax result for the State" than combined reporting does.[24] This Court recently noted probable jurisdiction in a case challenging the constitutionality of combined reporting as applied to foreign subsidiaries and affiliates.[25] While we agree with the position taken by the appellant in that case, it is not necessary to reach the issues raised there to sustain

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[24] See Corrigan, *Mobil-izing Interstate Taxation*, Tax Notes, Vol. XIII, No. 15, Oct. 12, 1981, p. 808 (comparing Cases B and E to Case C, which is comparable to the present case).

[25] *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co., Illinois Department of Revenue et al., prob. juris. noted*, —— U.S. ——, No. 81-349. See also *Container Corporation of America* v. *Franchise Tax Board*, 117 Cal. App. 3d 988, 173 Cal. Rptr. 121 (1981), appeal docketed, No. 81-523.

appellant's position here. The MTC's admission that the decision below produces a "still higher tax result for the State" than does combined reporting is a direct acknowledgment that inclusion of dividends in the recipient's apportionable income without an adjustment in the apportionment factors results in a conceptually indefensible overstatement of the income attributable to the taxing State. As demonstrated above, the State is certainly attempting to collect a "higher tax" from appellant than it could ever hope to collect if appellant's subsidiaries were unincorporated divisions.[26] Penalizing appellant in this fashion is patently arbitrary and an unconstitutional violation of due process. *Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission*, 390 U.S. 317 (1968); *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931); *Underwood Typewriter Co.* v. *Chamberlain, supra; People ex rel. Alpha Portland Cement Co.* v. *Knaop*, 230 N.Y. 48, 129 N.E. 202 (1920). Appellee has ignored this Court's holding in *Mobil* (445 U.S. at 441) that trans-

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[26] For example, for 1969, appellant's reported apportionable business income of $22,364,079 (J.A. 109a) was increased on audit by approximately $59 million as a result of the inclusion of the dividends, interest, and capital gains in dispute here. (See App.B, *infra*, 5a) The dividends alone accounted for approximately $55 million. (*Ibid.*) However, *none* of the property, payroll, or sales of the dividend-paying subsidiaries and affiliates were taken into account by the MTC auditor. The only token gesture made by the auditor was to increase the denominator of the sales fraction by the dividends and interest. (J.A. 73a) As a result, the apportionment factor was reduced by only .06709 of 1% from 2.59955% to 2.53246%. (See App.B, *infra*, 6a) Comparable adjustments to apportionable business income and the apportionment factor were made in 1968 and 1970. These *de minimis* adjustments to the apportionment factor in each year were plainly inadequate to reflect the underlying property, payroll, and sales which (1) produced the additional income, and (2) would have been taken into account had the businesses been run as unitary divisions of appellant rather than being run by separate subsidiaries and affiliates.

forming divisional profits of a unitary business into dividends "works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives."[27]

The issue is not, as appellee would have it, whether dividends *per se* are the income of the recipient or are paid out of the income of the payor. (See Motion to Dismiss, p. 16.) The real issue is whether the apportionment formula fairly employs, on a consistently applied basis, factors which reflect " 'the relative contribution of the activities in the various states to the production of the total unitary income.' " *Butler Bros.* v. *McColgan, supra,* 315 U.S. at 509. Under formulary apportionment, the total income of the unitary business must be ratably divided (on the basis of the apportionment factors employed) between

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[27] Appellee's attempt to hide behind corporate barriers is made clear by the example in its Motion to Dismiss (pp. 15-16) in which a taxpayer described in the motion as doing business only in Idaho and Oregon receives a dividend from a corporation which "confines all of its business activities to the State of Wyoming." Appellee asserts that it is incorrect for the taxpayer-recipient to take into account the Wyoming property, payroll, and sales of the dividend-paying corporation because the taxpayer "conducts no business" in Wyoming and "cannot be said to have earned taxable income in Wyoming." This conclusion is manifestly inconsistent with the premise on which appellee's example is based. If the dividend is properly treated as part of the taxpayer's unitary business income, which it must be before it can be apportioned under *Mobil*, then it is manifest that a portion of the income of the unitary business has been earned in Wyoming. After all, the example presupposes that the company paying the dividend "confines all of its business activities" to Wyoming. Under these circumstances, the dividend paid out of the Wyoming income is not subject to tax as such by a nondomiciliary State in which the recipient also does business. The nondomiciliary State may only tax income which is attributable to activities in that State. Recognition of the Wyoming property, payroll, and sales in the Idaho and Oregon apportionment factors is an appropriate way of achieving that result.

the taxing State and all other jurisdictions in which the unitary business is conducted, so that the taxing State receives the same "rate of return" as is earned by the entire business collectively.[28] Thus, where the traditional three-factor apportionment formula is properly employed, the taxing State should receive the same amount of income for every dollar of property, payroll, and sales in the State as the entire unitary business earns for every dollar of total property, payroll, and sales in all locations. This concept *cannot possibly work*, however, if a State which uses the three-factor formula overloads its own "rate of return," as Idaho has done here, by giving full weight to property, payroll, and sales in the State, but only token weight to sales outside the State, and no weight *at all* to property and payroll outside the State. By ignoring out-of-state property and activities, Idaho has unfairly increased the weight given to property and activities within the State. By so doing, it seeks to increase its "rate of return" (*i.e.*, the income it earns for every dollar of local property, payroll, and sales) to a rate *higher* than the average rate applicable to the unitary business as a whole. This is so alien to the whole concept of "unitary" apportionment that it is a *per se* violation of the Due Process Clause.

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[28] The basic apportionment formula, using a single property, payroll, and sales ("PPS") factor for simplicity, is:

$$\text{unitary income} \times \frac{\text{state PPS}}{\text{total PPS}} = \text{state income}$$

Mathematically, this is equivalent to:

$$\frac{\text{state PPS}}{\text{total PPS}} = \frac{\text{state income}}{\text{unitary income}}$$

The "rate of return" everywhere should be constant because the foregoing equation can be rewritten:

$$\frac{\text{state income}}{\text{state PPS}} = \frac{\text{unitary income}}{\text{total PPS}}$$

This view of the conceptual relationship between apportionable business income and the apportionment factors is hardly new or novel. In addition to Mr. Justice Stevens' recognition of this relationship in his dissent in *Mobil*, see also *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, *supra*, and *Household Finance Corp.* v. *State Tax Commission*, 212 Md. 80, 128 A.2d 640, 649 (1957). Cf. *F. W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972). In the *Alpha Portland Cement* case, as here, investment income was included in apportionable income without adjusting the apportionment factor to reflect the out-of-state assets which generated the income. The court, in an opinion by Judge Cardozo, invalidated the statutory scheme, stating (129 N.E. at 204, 206):

> The interest enters into the income on which the tax has been computed; the principal has been excluded in the allocation of the assets.
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> Dividends from other shares, those of the Anvil Stone Company, are included in the income; the shares themselves do not enter into the terms of the proportion.
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> [T]he statute prescribes a rule of allocation which, as applied to foreign corporations holding bonds and shares in other states, involves an artificial and arbitrary augmentation of the value of the local privilege. It measures the value of the franchise, here and elsewhere, by income from all sources, and excludes some of the same sources when the value is apportioned. *To take from assets elsewhere is equivalent to adding to assets here.*
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> [A] method of apportionment which purposely ignores realities, which compels an assessor to look to some of the assets only, and close his eyes to all the others, is arbitrary and unreasonable in its increase of the local burden. [Emphasis supplied.]

Similarly, Idaho should not be permitted to add to the income-producing value of the property, payroll, and sales

in Idaho by ignoring a substantial portion of the income-producing property, payroll, and sales outside the State. If some portion of the dividends, capital gains, or interest in issue here is to be included in appellant's apportionable business income, due process requires that the apportionment factors be modified in a way which will meaningfully and fairly reflect the out-of-state property, payroll, and sales which generated that income.

With respect to dividends, we believe, as proposed below, that this can ordinarily best be done by increasing the denominators of the property, payroll, and sales fractions by an appropriate percentage of the property, payroll, and sales of the corporations paying the dividends. The appropriate percentage, in each case, could be determined by comparing the dividends received by appellant from a particular corporation with that corporation's earnings for that year. For example, if appellant owned 50% of a corporation's stock and the corporation paid out 30% of its earnings for the year as dividends, 15% (*i.e.*, 30% of 50%) of the corporation's property, payroll, and sales for that year would be included in the denominators of appellant's apportionment fractions for that year.[29]

Appellee objects (Motion to Dismiss, p. 14) to the sufficiency of the evidence in this case, asserting that it fails to satisfy the "clear and cogent" standard of *Butler Bros.* v. *McColgan, supra*, 315 U.S. at 507, which applies when

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[29] There are a number of approaches which might be taken to modify the apportionment factors if interest or capital gains are included in apportionable business income. Consequently, if it becomes necessary to modify the apportionment factors in this case, we suggest that this be done, in the first instance, by the State District Court on remand, in the light of the specific facts bearing on the particular dividends, interest, or gains in issue. Of course, appellant reserves the right to challenge the constitutionality of any modified apportionment formula adopted by the MTC or State District Court if that formula, as applied to appellant, results in a denial of due process as defined by this Court's decisions.

a taxpayer attempts to show that the taxing State's apportionment formula results in the taxation of "extraterritorial values." However, the dramatic eight-fold increase in appellant's Idaho taxable income for the years 1969-1970 (see p. 6, *supra*) more than satisfies any evidentiary burden. Moreover, as this Court pointed out in *Underwood Typewriter Co.* v. *Chamberlain, supra,* 254 U.S. at 121, an apportionment formula can be invalidated by showing that it is "inherently arbitrary." In view of the demonstrated conceptual relationship between the apportionment base and the apportionment factors, Idaho's failure to adjust the apportionment factors will "inevitably" produce an arbitrary result if the dividends or other comparable income items are included in the apportionable income base. See *Mobil,* 445 U.S. at 461 (dissenting opinion).

B. The Foreign Commerce Clause.

Mobil also involved the application of the Commerce Clause, but the decision there is not dispositive of the Foreign Commerce Clause issue presented here. In *Mobil,* the taxpayer argued that Vermont's tax imposed a burden on interstate and foreign commerce by subjecting Mobil's dividend income to a substantial risk of multiple state taxation. Mobil premised that multiple taxation argument on the assumption that all of its dividend income was fully taxable in the State of commercial domicile (New York, in its case) and, therefore, any apportionment to Vermont unavoidably subjected Mobil to the risk of multiple state taxation.

This Court rejected Mobil's argument, both with respect to an alleged burden on interstate commerce and with respect to foreign commerce. With respect to interstate commerce, the Court stated (445 U.S. at 445-446):

> Although we do not now presume to pass on the constitutionality of a hypothetical New York tax, we may assume, for present purposes, that the State of com-

> mercial domicile has the authority to lay some tax on appellant's dividend income as well as on the value of its stock. But there is no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method. Since Vermont seeks to tax income, not ownership, we hold that its interest in taxing a proportionate share of appellant's dividend income is not overridden by any interest of the State of commercial domicile.

Then, with respect to Mobil's foreign commerce argument, this Court added (445 U.S. at 446-447):

> . . . Mobil suggests that dividends from foreign sources must be allocated to the State of commercial domicile, even if dividends from subsidiaries and affiliates operating domestically are not. By accepting the power of the State of commercial domicile to tax foreign-source dividend income, appellant eschews the broad proposition that foreign-source dividends are immune from state taxation. It presses the narrower contention that, because of the risk of multiple taxation abroad, allocation of foreign-source income to a single situs is required at home.
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> By admitting the power of the State of commercial domicile to tax foreign-source dividends *in full*, Mobil necessarily forgoes any contention that local duplication of foreign taxes is proscribed. Thus, the only inquiry of constitutional dimension is the familiar question whether taxation by apportionment at home produces significantly greater tax burdens than taxation by allocation. Once appellant's argument is placed in this perspective, the presence or absence of taxation abroad diminishes in importance.

Appellant now asserts the Foreign Commerce Clause argument which Mobil refrained from making—namely, that *any* "local duplication of foreign taxes is proscribed."

As a general rule, *interstate* commerce is not exempt from state taxation provided the state tax in issue is applied to an activity having a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977); *Washington Rev. Dept.* v. *Stevedoring Assn.*, 435 U.S. 734, 750 (1978). But when a State seeks to tax *foreign* commerce, two additional questions must be considered: "[f]irst, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd.*, v. *County of Los Angeles*, 441 U.S. 434, 451 (1979) (hereinafter "*Japan Line*"). "If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause." *Ibid.* Idaho's tax contravenes both precepts.

1. *The Substantial Risk of Double Taxation:* There is worldwide recognition of the principle that the source nation (*i.e.*, the nation where income originates) has the primary right to tax the gross amount of dividends, interest, royalties, and other similar items of income paid by a resident of the source nation to a nonresident.[30] In accordance with that "custom of nations" (*Japan Line*, 441 U.S. at 447, 454), Australia and Mexico both impose their income tax on the full amount of dividends and interest paid by resident companies to nonresidents.[31] Accordingly, appellant was subject to a 15% Australian withholding tax

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[30] See the discussion in nn. 37 and 38, *infra*.

[31] See Secs. 128A, 128B, and 221YL of the Australian Income Tax Assessment Act 1936, as amended by Act No. 85, Acts of the Parliament of the Commonwealth of Australia (1967); and Articles 60 V, 61, 73 I and 74 of the Mexican Income Tax Law repro-

and a 20% Mexican withholding tax on the full amount of the dividends it received from M.I.M. and Mexicana, respectively.[32] Appellant was also subject to a 10% Mexican withholding tax on the full amount of the interest it received on the note issued to it in connection with its prior sale of Mexicana stock.[33] During the years in issue, appellant's dividends from M.I.M. amounted to over $63 million, its dividends from Mexicana amounted to over $5 million, and its interest on the Mexican note amounted to more than $1 million. (J.A. 52a-53a) Its foreign tax liability on these items therefore amounted to over $10.5 million. Consequently, any taxation by Idaho of this foreign source income "creates more than the *risk* of multiple taxation; it produces multiple taxation in fact." *Japan Line*, 441 U.S. at 452.

In *Japan Line*, the question was whether local governmental units in California could impose property taxes on cargo containers that were subject to tax in Japan. Because Japan taxed the full value of the containers, this Court held that *any* additional state tax, regardless of how the tax was apportioned, would inevitably produce double taxation in contravention of the Foreign Commerce Clause.

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duced in App. A, *infra*. These laws clearly provide that the foreign withholding taxes are imposed on the nonresident recipient of the dividends or interest payment. Although the tax is remitted to the foreign government by the foreign payor of the dividend or interest, the payor is simply acting as a withholding agent for the recipient. Thus, it is clear that the taxpayer subject to foreign tax on the dividends and interest in question here was appellant—not M.I.M. or Mexicana.

[32] *Ibid.* By reason of Article VII of the Income Tax Convention between the United States and Australia, May 14, 1953, 4 U.S.T. 2274, T.I.A.S. No. 2880, the Australian statutory withholding tax rate was reduced to 15%.

[33] See Articles 60 I, 61 and 66 of the Mexican Income Tax Law reproduced in App. A, *infra*.

We recognize that a different situation may be presented in the case of income taxes. The theory of apportionment, as applied in an income tax context, is that the taxing State is not taxing any out-of-state income as such, but is simply using the out-of-state income, and the out-of-state property, payroll, and sales factors, as a means of more accurately calculating the portion of the total income which is fairly attributable to the activities in the taxing State. Thus, if foreign-source income items which have been taxed abroad are included in the apportionable income base, it is conceivable that multiple income taxation by the State could be avoided by a correlative decrease in the apportionment factors to reflect the foreign property, payroll, and sales associated with that income.[34] We have previously argued that such an adjustment to the apportionment factors is required by the Due Process Clause. However, if the Court

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[34] Since such an adjustment to the apportionment factors would decrease the percentage of the other apportionable income that would otherwise be taxed by the nondomiciliary State, the adjustment could theoretically offset the effect of imposing a second tax on a portion of the foreign-source income.

There are, however, powerful arguments which can be made to support the conclusion that unitary apportionment of foreign-source income in this fashion is not constitutionally acceptable in practice, even if theoretically appropriate apportionment factors are used. See the Jurisdictional Statements filed in *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co., Illinois Department of Revenue et al., supra,* and *Container Corporation of America* v. *Franchise Tax Board, supra.* We need not now reach that issue in this case, since it is clear that Idaho has made no meaningful adjustment to its regular apportionment factors, with the result that a double tax is being asserted. If this case is remanded for the purpose of permitting the State to modify the apportionment factors, appellant reserves the right to challenge the constitutionality of the modified apportionment formula if, in light of the facts and this Court's decisions, the formula as applied to appellant still results in the effective imposition of a state tax on foreign-source income which has already been taxed abroad.

holds that the Due Process Clause does not require Idaho to make a correlative adjustment to the apportionment factors, Idaho would then be taxing a portion of the foreign dividends and interest *in addition to* its full share of the other apportionable business income. Under these circumstances, it *unavoidably* follows that the dividends and interest would be subject to multiple taxation—full taxation by the source nation and partial taxation by Idaho. Such a result cannot be squared with *Japan Line*.

2. *Federal Government Policy:* The remaining consideration that must be taken into account under *Japan Line* is whether the asserted state tax may "impair federal uniformity" by preventing the Federal Government from " 'speaking with one voice when regulating commercial relations with foreign governments.' " *Japan Line*, 441 U.S. at 448, 451. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees* v. *United States*, 289 U.S. 48, 59 (1933).

Since the enactment of sections 222 and 238 of the Revenue Act of 1918, ch. 18, 40 Stat. 1057, the revenue laws of the United States have been premised on the principle that the jurisdiction where income is generated has the primary right to tax that income, with the result that United States taxpayers should be allowed to reduce their regular federal tax liability by the amount of foreign income tax paid on their foreign-source income.[35] Surrey, *Current Issues in the*

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[35] The foreign tax credit provisions were originally adopted in the Revenue Act of 1918 in order to relieve a "very severe burden" imposed as the result of multiple taxation. H.R. Rep. No. 767, 65th Cong., 2d Sess. (1918) (1939-1 C.B. (Pt. 2) 86, 93). The substance of those provisions of the 1918 Revenue Act is now contained in sections 901 and 902 of the Internal Revenue Code. A credit mechanism is needed to avoid double taxation because a

Taxation of Corporate Foreign Investment, 56 Colum. L. Rev. 815, 817 (1956); E. Owens, *The Foreign Tax Credit* (1961), pp. 2-3, 590-591. The United States has also sought to reduce the risk of double taxation of dividends through tax treaties which assure that the recipient's country will allow a credit or offset for taxes paid to the source country.[36] The position taken by the United States in its treaties is in accordance with model international tax conventions which have recognized the primary right of the source nation to impose a tax on corporate dividends, with the nation where the shareholder resides having a concomitant responsibility to reduce its regular tax on that dividend income by an equivalent amount. See Article 10, Article 23A, and Article 23B of the Draft Double Taxation Convention on Income and Capital (1963) adopted by the Organization for Economic Co-Operation and Development (the "OECD").[37]

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domestic corporation or citizen of the United States is subject to United States tax on worldwide income. When the income is from sources outside the United States and is taxed in the country where it originates, the United States taxpayer may take a credit for the foreign taxes paid. The credit generally operates to reduce the effective overall tax rate to the foreign or the federal rate, whichever is higher. Double taxation is eliminated because, in effect, only one tax is paid at the higher of the two rates. E. Owens, *The Foreign Tax Credit* (1961), pp. 3-6.

[36] Provisions to this effect are included in 27 ratified conventions and 13 pending conventions between the United States and various foreign countries. These conventions are listed in App.C, *infra*.

[37] The problem of multiple taxation of foreign commerce was highlighted during World War I because of the taxes imposed by the world community to finance the war. The League of Nations quickly took up the problem of multiple taxation of international commerce and it published several reports in an effort to establish uniform tax principles. The international tax report of the League

It is obvious, we think, that the United States can speak with "one voice" in regulating foreign commerce only if the States and political subdivisions that choose to tax income from foreign commerce are required to recognize and implement the basic policies which the Federal Government applies in taxing such income. The avoidance of double taxation of foreign-source income is such a policy. Moreover, the Federal Government's policy in this area is clearly in accord with the "custom of nations." See *Japan Line*, 441 U.S. at 447, 454. Virtually every developed non-communist country in the world has an income tax structure which is designed to avoid double taxation of interna-

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of Nations adopted in 1943 by its Fiscal Committee embraced the concepts of taxation at source, with the obligation to relieve taxpayers from multiple taxation shifting to the country of residence. Model Bilateral Convention for the Prevention of International Double Taxation and Fiscal Evasion, League of Nations Document. See Ke Chin Wang, *International Double Taxation of Income: Relief Through International Agreement 1921-1945*, 59 Harv. L. Rev. 73, 81-97 (1945).

Since World War II, the OECD, of which the United States is a member, has continued to promote model conventions to prevent multiple taxation of international commerce. Article 10 of the 1963 model convention provides that dividends may be taxed in either the country of source or the country of the shareholder's residence. If the country of source imposes a tax, however, the burden is shifted to the country of residence to provide relief. Articles 23A and 23B. A similar principle is applicable to interest income. Article 11. The model convention included in the 1977 Report of the OECD Committee on Fiscal Affairs contains similar provisions. The United States Department of Treasury has adopted the OECD model convention as its basic negotiating position in bilateral income tax treaty negotiations. 46 Fed. Reg. 37432 (July 20, 1981).

tional income by effectively giving taxing priority to the source nation.[38]

Because this policy is firmly embedded in federal law and treaties, and clearly constitutes the custom of nations, we think it is constitutionally intolerable for the States to disregard it. Put differently, we believe that any State choosing to include foreign-source income in its apportionable tax base has a constitutional obligation to devise some mechanism which will effectively prevent the imposition of a second tax on any income which has already been taxed abroad by the source nation.[39]

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[38] This is generally done either by excluding the foreign-source income from the tax base altogether, or by taxing it and then allowing a credit for the tax imposed by the source nation. See Dr. D. Juch, "General Report on Unilateral Measures to Prevent Double Taxation," *Cahiers de Droit Fiscal International*, Vol. LXVI b, International Fiscal Association, XXXV Congress, Berlin (1981). As stated at pp. 18-19 of that report, and in the more detailed national reports which follow in the same volume, Argentina, Australia, Austria, Belgium, Brazil, France, the Netherlands, Norway, Portugal, and Switzerland are among the countries using a full or partial exemption system; and Canada, Colombia, Denmark, Germany, Finland, Japan, Spain, Sweden, the United Kingdom, and the United States are among the countries using the credit system.

[39] The fact that bills regulating state taxation of foreign income have been introduced in Congress, but not enacted, should not prevent this Court from requiring the States to act in a manner consistent with long-standing, consistently implemented federal policy. Congressional failure to act should not be viewed as tacit approval of current state practices where, as here, it can be shown that those practices are fundamentally at odds with the Federal Government's taxing policy with respect to foreign income as evidenced by laws which Congress *has* enacted and treaties which the Senate *has* ratified. State action which imposes a clear burden on foreign commerce by subjecting foreign income to double tax is contrary to the Foreign Commerce Clause and should therefore be pro-

Idaho's taxing statute does not comport with federal policy, either in concept or in practice. Idaho makes no effort to reflect, in any way, the foreign withholding taxes imposed on foreign-source dividends, interest, royalties, or other similar income items received by Idaho residents. Thus, if M.I.M. declares a $100 dividend to appellant, withholds the $15 of Australian tax which appellant owes, and remits the remaining $85 to appellant, Idaho will include the full $100 in appellant's apportionable business income. Moreover, Idaho will tax a portion of that amount without allowing any credit or other offset for the $15 Australian withholding tax borne by appellant on the same income,

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hibited by this Court until and unless Congress takes affirmative action to sanction it.

In *Mobil*, this Court stated (445 U.S. at 448) that "[a]bsent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States." However, this statement was clearly made in the context of a discussion which was *not* dealing with "problems of duplicative taxation at the international level" but was, instead, focusing on "the wholly different sphere of multiple taxation among our States." *Ibid.* Where, however, foreign commerce is involved, this Court has made it clear that the States are not "free to impose demonstrable burdens" on such commerce simply because Congress has not "pre-empted the field by affirmative regulation." *Japan Line*, 441 U.S. 454. This is because:

> [I]t long has been "accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." [Citation deleted; *Ibid.*]

and without making any meaningful adjustment to the regular Idaho apportionment factors.[40]

This Court cannot prevent Australia and other foreign countries from continuing to tax appellant on 100% of the dividends and interest it receives from those countries. See *Japan Line*, 441 U.S. at 447-448. Accordingly, inclusion of the dividends and interest in appellant's apportionable income for state tax purposes, without offsetting relief, inevitably means that more than 100% of the income will be taxed. The resulting double taxation imposes an actual burden on foreign commerce which is significant now[41]

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[40] In addition to reporting the $100 dividend for federal tax purposes, appellant must, if it elects to claim a "deemed paid" foreign tax credit for Australian income taxes imposed on M.I.M., treat an amount equal to that deemed paid credit as additional dividend income under the "gross-up" provisions in section 78 of the Internal Revenue Code. As an administrative matter, Idaho does permit appellant to exclude from its apportionable business income any "gross-up" reported on appellant's federal return. However, this adjustment does nothing to cure the problem with respect to the actual dividend of $100, which is subject to tax in Idaho as well as in Australia.

[41] There are presently at least 27 States which apportion dividend income. See Appendix F to the Jurisdictional Statement filed in *Mobil*, a copy of which is reproduced in J.S.App.F. In 1974, the latest year for which federal tax return statistics are available, United States corporations claiming a foreign tax credit received foreign-source dividends of over $6.1 billion. 1974 Statistics of Income, International Income and Taxes, Foreign Tax Credit (GPO, Washington, D.C. 1980), p. 9, col. 2.

and could become appreciably greater in the near-term future.[42] We urge this Court to eliminate that burden by applying the principles of *Japan Line* to state income as well as property taxes.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and remand the case to the Supreme Court of Idaho for further proceedings in conformity with this Court's opinion.

Respectfully submitted,

GEORGE W. BEATTY
(Counsel of Record)
C. RUDOLF PETERSON
WILLIAM L. GOLDMAN
JAMES A. RIEDY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501

Counsel for Appellant

ALEXANDER J. GILLESPIE, JR.
120 Broadway
New York, N.Y. 10271

Of Counsel

November 19, 1981

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[42] During the last decade, major American-based industrial companies have derived a steadily increasing percentage of their total earnings from overseas operations conducted through foreign subsidiaries and affiliates; the earnings which these companies have repatriated from direct investments abroad have increased fivefold in the last decade "to an estimated $41 billion for 1981." Janssen, *Tracking a Trend,* Wall St. J., Mar. 11, 1981, p. 56. There is every reason to expect this trend to continue.

APPENDIX A

[Australia] Income Tax Assessment Act 1936, as amended by Act No. 85, Acts of the Parliament of the Commonwealth of Australia (1967).

DIVISION 11A.—Dividends and Interest paid to Non-residents.

128A.—(1.) In this Division, unless the contrary intention appears—dividend includes part of a dividend; interest includes an amount in the nature of interest, but does not include an amount deemed to be interest by section twenty-six C of this Act; non-resident does not include a resident of a Territory of the Commonwealth.

* * * * * * * * * * *

128B.—(1.) Subject to sub-section (3.) of this section, this section applies to income that—

(a) is derived, on or after the first day of January, One thousand nine hundred and sixty-eight, by a non-resident, other than a non-resident who carries on business in Australia at or through a permanent establishment of the non-resident in Australia; and

(b) consists of a dividend paid by a company that is a resident. . .

* * * * * * * * * * *

(4.) A person who derives income to which this section applies that consists of a dividend is liable to pay income tax upon that income at the rate declared by the Parliament in respect of income to which this sub-section applies.

* * * * * * * * * * *

221YL (1.) Where—

(a) the holder, or (if there is more than one holder) any holder, of a share or stock in a company that is a resident is shown, in relation to the share or stock,

in the register of members of the company as having an address outside Australia; or

(b) the holder of a share or stock in a company that is a resident has authorized or directed the company to pay dividends in respect of the share or stock to himself, or to any other person, at a place outside Australia,

the company shall, subject to this section and to the next succeeding section, before or at the time when a dividend of the company is paid by the company in respect of the share or stock, make a deduction from the dividend of an amount determined in accordance with the regulations.

* * * * * * * * * * *

Income Tax Law of Mexico[1]

CHAPTER II

TAX ON INCOME FROM CAPITAL INVESTMENT

ARTICLE 60. [Income subject to tax.] The tax referred to in this chapter is imposed on any receipts in cash or in kind derived from the following types of capital investments:

I. Income from:

a) Interest arising from any kind of act, contract, or agreement;

* * * * * * * * * * *

V. Income from profits distributed by all entities established in Mexico and from profits which should be distributed by branches or agencies of foreign entities established in Mexico.

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[1] These statutes were excerpted from the Commerce Clearing House Spanish-English Edition of the Mexican Income and Commercial Receipts Tax Laws effective January 1, 1967.

ARTICLE 61. [Persons subject to tax.] The tax on income from capital investments is imposed on the persons receiving the income described in the preceding article notwithstanding any agreement or pact to the contrary.

* * * * * * * * * *

ARTICLE 66. [Interest subject only to the 10% tax.] The following type of interest income is taxable at the 10% rate:

I. Interest from acceptances, loans, and other credits issued by credit institutions, auxiliary organizations, or foreign banks.

II. Interest derived from transactions entered into by persons domiciled abroad when the amount of the credit is used for purposes of public interest in the judgment of the Ministry of Finance and Public Credit.

The payor of the interest referred to in this article must withhold the tax.

* * * * * * * * * *

ARTICLE 73. [Income from company distributions.] The tax to which paragraph V of Article 60 refers is imposed:

I. In the case of all Mexican corporations and entities:

a) On the distributed profits;

* * * * * * * * * *

ARTICLE 74. [Rates.] The tax to which paragraphs I and III of the preceding article refer is the amount resulting from applying the following rates to the taxable income realized by each taxpayer during a calendar year:

Up to 180,000 pesos	15%
From 180,000 pesos to 270,000 pesos	17.5%
Over 270,000 pesos	20%

The tax must be withheld by the entities or individuals making the payments described under paragraphs I and III of the preceding article. For this purpose, the payor must keep a cumulative record of the amounts paid to the stockholders or partners in the calendar year. Before any payments in kind are made, the stockholder or partner must furnish the company with the necessary funds to pay the tax.

APPENDIX B

1969 Adjustment to Idaho Apportionable Business Income as a Consequence of Inclusion of Disputed Items

a. Dividends (J.A. 52a)	
Southern Peru	$32,234,880
M.I.M.	20,466,130
Mexicana	1,882,918
General Cable	5,333,449
Revere	2,814,444
	$62,731,821
b. Interest (J.A. 53a)	
Note from sale of Mexicana stock	$ 363,000
Revere debentures	1,251,965
	$1,614,965
c. Capital gain (J.A. 51a)	
Sale of M.I.M. stock	$ 2,230,370
d. Subtotal (a + b + c)	$66,577,156
e. Foreign dividend gross-up (J.A. 67a)	($ 6,276,623)
f. Capital gain adjustment (J.A. 67a)	($ 1,271,079)
g. Total adjustment (d — e — f)	$59,029,454

1969 Adjustment to Idaho Apportionment Factor As a Consequence of Including Disputed Items in Denominator of Sales Factor

a. Idaho property factor*			2.74604
b. Idaho payroll factor*			3.50263
c. Idaho sales factor*	$\frac{\$\ 6{,}031{,}376}{\$447{,}192{,}560}$	=	1.34872
d. Idaho apportionment factor* (a + b + c) ÷ 3			2.53246
e. Idaho sales factor if disputed items are not included in denominator	$\frac{\$\ 6{,}031{,}376}{\$389{,}122{,}397**}$	=	1.54999
f. Recomputed Idaho apportionment factor (a + b + e) ÷ 3			2.59955
g. Adjustment to Idaho apportionment factor as a consequence of MTC auditor's inclusion of disputed items in denominator of sales factor line f — line d			.06709

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* See J.A. 71a-73a. These figures reflect all adjustments made by the MTC auditor.

** $389,122,397 = $447,192,560 minus (1) adjusted dividends of $56,455,198 (*i.e.*, dividends of $62,731,821 less foreign dividend gross-up of $6,276,623) and minus (2) interest of $1,614,965. See this Appendix, 5a.

APPENDIX C

U.S. Income Tax Conventions Providing for Relief from Double Taxation by Allowance of a Credit to a Resident Taxpayer for Taxes Paid to the Source Nation:

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No. 4232; Poland (Art. 20), Oct. 8, 1974, 28 U.S.T. 891, T.I.A.S. No. 8486; Romania (Art. 21), Dec. 4, 1973, 27 U.S.T. 165, T.I.A.S. No. 8228; Sweden (Art. XIV), Mar. 23, 1939, 54 Stat. 1759, T.I.A.S. No. 958, as amended, Oct. 22, 1963, 15 U.S.T. 1824, T.I.A.S. No. 5656; Switzerland (Art. XV), May 24, 1951, 2 U.S.T. 1751, T.I.A.S. No. 2316; Trinidad and Tobago (Art. 4), Jan. 9, 1970, 22 U.S.T. 164, T.I.A.S. No. 7047; Union of South Africa (Art. IV), Dec. 13, 1946, 3 U.S.T. 3821, T.I.A.S. No. 2510; United Kingdom (Art. 23), Dec. 31, 1975, —— U.S.T. ——, T.I.A.S. No. 9682.

B. Pending Income Tax Conventions between the United States and:

Argentina (Art. 23), May 7, 1981; Bangladesh (Art. 22), Oct. 6, 1980; Brazil (Art. 4), Mar. 13, 1967; British Virgin Islands (Art. 22), Feb. 18, 1981; Cyprus (Art. 5), Mar. 26, 1980; India (Art. XII), Nov. 10, 1959; Israel (Art. 26), Nov. 20, 1975; Jamaica (Art. 24), May 21, 1980; Malta (Art. 24), Mar. 21, 1980; Morocco (Art. 21), Aug. 1, 1977; Philippines (Art. 23), Oct. 1, 1976; Thailand (Art. 22), Mar. 1, 1965; United Arab Republic (Art. 25), Aug. 24, 1980. The pending conventions may be found in Volumes 1 and 2 of the Commerce Clearing House Tax Treaties looseleaf service.

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No. 80-2015

In The

Supreme Court of the United States

October Term, 1981

ASARCO INCORPORATED (formerly THE AMERICAN SMELTING AND REFINING COMPANY),

Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Appellee.

APPEAL FROM THE SUPREME COURT OF IDAHO

BRIEF OF APPELLEE

DAVID H. LEROY
Attorney General

THEODORE V. SPANGLER, JR.
Deputy Attorney General
(Counsel of Record)
State Tax Commission
P. O. Box 36
Boise, Idaho 83722
(208) 334-4560

Counsel for Appellee

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Are the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA), as adopted in Idaho and construed by the Idaho Supreme Court, requiring apportionment of income from intangibles acquired, managed and disposed of as a regular part of the taxpayer's unitary trade or business operations consistent with the Due Process Clause of the Fourteenth Amendment?

2. Are the provisions of UDITPA, as enacted in Idaho and construed by the Idaho Supreme Court, requiring apportionment of income received from intangibles acquired, managed and disposed of as a regular part of the taxpayer's unitary trade or business consistent with the Commerce Clause of Article I, Section 8 of the Constitution?

3. Was the Idaho Supreme Court's holding that under UDITPA no adjustment to apportionment factors is required consistent with the Due Process and Foreign Commerce Clauses?

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A. Apportionment of income from intangibles is constitutionally permitted when the intangibles are held and used as part of the taxpayer's unitary business. 9

B. The evidence supports the Idaho court's conclusion that ASARCO failed to prove by clear and cogent evidence that the income in question was separate from its unitary business. 17

II. The Standards Three Factor Formula provided by UDITPA and used by Idaho reaches a proper apportionment result in this case without any special adjustments being applied. 24

A. Nothing in the Due Process Clause requires that the UDITPA apportionment factors be modified in this case. 24

B. Idaho's apportionment of ASARCO's income is not a violation of the "Foreign Commerce" Clause of the Federal Constitution. 39

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Corrigan, "Mobil-izing Interstate Taxation," *Tax Notes*, Vol. XIII, No. 15, Oct. 12, 1981, p. 808 39

Dexter, "The Unitary Concept in State Income Taxation of Multistate-Multinational Business", 10 *The Urban Lawyer* 181 (1978) 23

Keesling, "The Impact of the *Mobil* Case on Apportionment of Income", 1981 *Brigham Young University Law Review* 87 35

Keesling, "A Current Look at the Combined Report and Uniform Allocation Practices" 42 *J. Tax* 106 (1973) 31

IRS Publication 1026 "Supplemental Report. Statistics of Income—1974-1978, International Income and Taxes, U. S. Corporations and Their Controlled Foreign Corporations" (1981) 38

COUNTER-STATEMENT OF THE CASE[1]

ASARCO is a multinational corporation which mines copper, gold, silver, lead, zinc and other non-ferrous metals, smelts and refines these metals and sells secondary metals [Joint Appendix (hereinafter "J. A.") pp. 83a-84a].

Principally in Idaho it mines silver although it also mines lead and zinc, operates its northwest mining division administrative office and sells secondary metals. Ore from Idaho mining is shipped to its own smelters outside Idaho. During 1968, 1969 and 1970, ASARCO also conducted extensive exploration in Idaho. (Reporter's Transcript (Rptr's Tr.) pp. 8-12, 146-147, 15-17 and J. A. pp. 38a-40a).

ASARCO reported its Idaho taxable income in 1969 and 1970 on the basis that it conducted a unitary business both within and without Idaho. (J. A. pp. 105a-119a). It does not contend that its operations conducted partly in Idaho were not an integral part of its overall business; but its income tax returns excluded from apportionable income the gross amount of all income from intangibles (including interest, dividends, royalties and income from sale of stocks) and the gross income from the rental of housing to its employees (without deduction of related business expenses). (J. A. p. 109a, ln. 31h and p. 117a, ln. 31j).

Based upon an audit by the Multistate Tax Commission (MTC) on behalf of Idaho and five other states, the

---

1 Much of the factual record is a lengthy stipulation of the parties (J. A. pp. 26a-119a). One exhibit to the stipulation is the narrative report of the auditor who performed the audit upon which these assessments were based. The parties stipulated that "the facts reflected in the MTC audit report are correct . . ." except as they related to adjustments to the sales factor—an issue not before this Court. (J. A. p. 26a ¶ 1). This report is at J. A. pp. 83a-103a.

Idaho State Tax Commission (Commission) combined with ASARCO six of its wholly owned domestic and foreign subsidiaries, thus taxing ASARCO in reference to the combined group. Additionally, the Commission reclassified as apportionable income all income from intangibles (other than that received from the combined subsidiaries). (J. A. pp. 59a, 67a, 75a). ASARCO unsuccessfully protested both adjustments to the Commission. [Juris. State. Appendix (J. S. App.) pp. 46a-62a]. It then appealed to the state district court which upheld the combination but overturned, on statutory grounds, the apportionment of income from intangibles. (J. S. App. 36a-37a). The Commission appealed the district court's conclusion that the intangible income could not be apportioned. ASARCO did not cross-appeal on the combination.

The Idaho Supreme Court, construing the statute (UDITPA), concluded that ASARCO had proven, by clear and convincing evidence, that some of these intangible assets were *not* acquired, managed or disposed of as a regular part of ASARCO's business. Thus substantial dividends from Lake Asbestos of Quebec, Ltd., and from ASARCO International, Hecla Mining Company, Kennecott Copper Company, Phelps-Dodge and United Park City Mines could not be apportioned by Idaho. (J. S. App. p. 23a). However, that court, still applying the statute, held that the other dividends, interest, gains, rents and royalties were earned from assets acquired, managed and disposed of in the regular course of ASARCO's unitary business, a part of which was conducted in Idaho. (J. S. App. p. 22a). Answering ASARCO's constitutional challenge, the Idaho court concluded:

> "any constitutional limitation upon a state's right to apportion the intangible income, including dividends, of a multistate corporation doing business within the

state are satisfied by the Idaho statutory requirement that the acquisition, management or disposition of the underlying asset must be an integral or necessary part of the taxpayer's unitary business, a part of which is conducted in this state." (J. S. App. p. 28a).

On appeal to this Court, the judgment of the Idaho Supreme Court was vacated and remanded "for further consideration in light of" *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U. S. 425 (1980) (J. S. App. 3a). Complying with the remand, the Idaho court received briefs and heard oral arguments from the parties and their amici. After analysis of both *Mobil, supra*, and *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U. S. 207 (1980), the Idaho court reinstated its original opinion without change (J. S. App. pp. 1a-2a).

SUMMARY OF THE ARGUMENT

(1) ASARCO interprets this Court's decision in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U. S. 425 (1980), too narrowly and inconsistently with other decisions of this Court. ASARCO contends that Idaho cannot apportion dividends, interest and capital gains from shareholdings in corporations in which it held substantial interest because, it alleges, there is no functional integration between ASARCO and those corporations. However, "functional integration" is not the proper due process test. The Due Process Clause requires that to apportion interstate income there must be (a) a minimal connection between the interstate activities and the taxing state and (b) a rational relationship between the income attributed to the state and the intrastate values of the activities taxed. *Mobil, supra.* A taxpayer attacking an apportionment result must show by clear and cogent evi-

dence that the tax does not meet these two due process requirements. *Butler Bros. v. McColgan*, 315 U. S. 501 (1942). ASARCO has not met this evidentiary standard in regard to either of these two due process requirements.

This Court has never held that intangibles or income from intangibles may not be apportioned if they are part of a unitary business partly conducted in the taxing state. Intangibles are part of a unitary business if they are acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business. It is this integration—i. e., between the business use of the intangible asset (the shares of stock) and ASARCO's mining, smelting and refining business—which makes the income part of the unitary business. If the income is part of ASARCO's own unitary business, the minimal connection requirement is satisfied.

While in some cases (as in *Mobil*), the existence of functional integration may establish that the intangibles are held for a purpose related to the unitary business; for due process purposes, it is the unitary business purpose not the functional integration which is controlling. Because the Idaho court justifiably found that these intangibles were acquired, managed and disposed of as a necessary part of the taxpayer's regular unitary business, the minimal connection requirement of the Due Process Clause is met.

The Idaho court carefully reviewed the factual record relating to all of the corporations from whose stock ASARCO received income. In regard to some stock, the Idaho court found that ASARCO had met the evidentiary requirement of *Idaho Code* § 63-3027 (a) (1) and had clearly separated these intangibles from its unitary business. That court therefore rejected the Idaho Tax Commission's at-

tempt to apportion income earned from these intangibles. The Idaho court concluded that the intangibles generating income challenged by ASARCO were assets held by ASARCO for purposes relating to its unitary mining, smelting and refining business. Substantial evidence in the record supports the Idaho court's opinion. Therefore, this Court should accept the Idaho court's factual finding and affirm its conclusion that the income may be apportioned.

(2) Alternatively to its main argument, ASARCO suggests that if dividends are apportioned then both the Due Process and Foreign Commerce Clauses require that the factors (property, payroll and sales) in the apportionment formula be adjusted to include in the denominators of ASARCO's factors proportionate parts of the property, payroll and sales of the corporations from whose stock the income was earned.

(a) ASARCO's second due process argument suffers from the same fallacy that undermines its principal due process argument that the income is not apportionable. The income being apportioned is its own income, not that of the payor corporations. ASARCO is a separate and distinct taxpayer. The due process issue is whether the income was earned as part of ASARCO's own unitary business. If it was, then the decisions of this court support apportioning that income to those jurisdictions in which ASARCO conducted its unitary business activities. The three factors used by Idaho—and most states—accomplish that result by attributing income to where the taxpayer's property, payroll and sales are located. Because the income is part of ASARCO's own unitary income and because the formula, without adjustment, apportions that income to the places where that unitary business is

conducted, nothing in the Due Process Clause requires modification of the formula.

ASARCO's contention that the property, payroll and sales of the payor corporations must be recognized in the formula confuses the apportionment of unitary income with the use of a "combined report" of income. The Idaho statute provides—and the Idaho court in this case required[2]—that if two or more corporations are together engaged in a functionally integrated unitary business both their income and their apportionment factors are to be combined together and tax computed as if the combined group is a single taxpayer. Such a combination accounts for all the business activities of corporations engaged in a unitary business, thereby recognizing activities of functionally integrated subsidiaries. These are two different aspects of the unitary business principle. Combined reporting identifies a unitary business consisting of two or more corporations. Defining apportionable income determines what income was earned by that business as a regular part of its unitary business activities which may, therefore, be apportioned. ASARCO's position totally fails to recognize this critical distinction.

(b) ASARCO's Foreign Commerce Clause argument was firmly rejected by this Court in *Mobil*. Although ASARCO purports to present an issue different than that decided in *Mobil*—i. e., that this income is immune from all state taxation—the issue really is not different. ASARCO relies only upon *Japan Lines v. County of Los Angeles*, 441 U. S. 434 (1979), for support. But that case dealt with property taxation of instrumentalities of foreign commerce when an international treaty expressly pro-

2 The trial court upheld, and ASARCO did not appeal, the combination of ASARCO with six of its wholly owned subsidiaries with which the court found ASARCO was conducting a unitary business.

hibited such taxation. As the *Mobil* court recognized, *Japan Lines* is irrelevant when a state seeks to determine the amount of a domestic taxpayer's unitary income attributable to that state. Additionally, as the *Mobil* court recognized, concurrent state and federal taxation is "an established norm." Even if duplicative taxation exists—which it does not because the foreign taxes are creditable against ASARCO's federal income taxes—there is no reason to prohibit concurrent state and foreign taxation. Furthermore, ASARCO is an American corporation doing business in the United States. Attribution of part of its income to a state of the United States is a wholly domestic question—not one of international law or policy. Therefore, any treaties or federal tax policies relating to international taxation are irrelevant.

(3) The record in the courts below is deficient as to all of the foregoing propositions. To successfully attack a state's apportionment result, the taxpayer must show "by clear and cogent evidence" that the result reaches extraterritorial values. ASARCO only presented as evidence its own irrelevant internal separate accounting analysis. This Court has rejected separate accounting as an insufficient method for impeaching a state's apportionment result in every case in which it has been presented. See e.g. *Exxon Corporation v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980).

This same lack of an adequate factual showing of distortion also applies to the first part of ASARCO's alternative argument that the Due Process Clause requires factor adjustments. As to its argument that factor adjustments are required by the Foreign Commerce Clause to prevent duplicative foreign taxation, the record is utterly devoid of any attempt to show that foreign taxes were paid, to which countries they were paid, by

which corporations they were paid, the amounts paid by each corporation to each country, or the legal incident of the foreign tax. Therefore, in order to address the effect, if any, such foreign taxation may have on the state's apportionment result, this Court must indulge in assumptions and speculations not justified by the record.

THE ARGUMENT

I.

Idaho only seeks to apportion income earned by ASARCO in the regular course of its integrated unitary business, a part of which is conducted in Idaho, in the manner permitted by the Due Process Clause.

The Due Process Clause allows income earned in interstate commerce to be apportioned if there is (a) a minimal connection between the interstate activities and the taxing state and (b) a rational relationship between the income attributed to the state and the intrastate values of the activities taxed. *Moorman Mfg. Company v. Bair,* 437 U.S. 267, 272-273 (1978); *Mobil Oil Corp v. Commissioner of Taxes of Vermont,* 445 U.S. 425 (1980). A taxpayer who attacks a state's apportionment result must show by clear and cogent evidence that the state's tax does not meet these two due process requirements. *Butler Bros. v. McColgan,* 315 U. S. 501 (1942). In part I of this brief, we shall show: (a) The due process requirements are met when the income to be apportioned is earned from intangibles which are acquired, managed and disposed of as a regular part of a taxpayer's unitary business. For income earned from intangibles (in this case dividends, interest and capital gains earned from shares of stock) to be part of a taxpayer's unitary income subject to apportionment, functional integration between the business activities of the payor and the activities of

the payee is not a constitutional requirement. (b) The Idaho court's ruling that ASARCO had failed to prove by clear and convincing evidence that the income at issue here was separate from its unitary business or that the income attributed to Idaho is not rationally related to intrastate values is supported by the record and, therefore, should be affirmed.

(A) Apportionment of income from intangibles is constitutionally permitted when the intangibles are held and used as part of the taxpayer's unitary business.

ASARCO's opening brief does not clearly explain the principal difference between the parties on this due process issue. ASARCO contends that the operating business relationships between ASARCO and each of the dividend payor corporations are insufficient to conclude that these companies are together engaged in a single unitary business. Accordingly, ASARCO contends that neither (a) the dividends nor (b) interest received from these corporations and the gain on disposition of their stock can be classified as apportionable business income by Idaho. We contend that the fact that ASARCO's acquisition, management and disposition of these intangible assets were regular parts of ASARCO's own unitary business disposes of the due process issue. The shares of stock were held for business purposes relating to ASARCO's unitary business of mining, smelting and refining non-ferrous metals. This integration—i.e., between the business use of the intangible assets and ASARCO's mining, smelting and refining business—supports treating the contested income as unitary business income subject to apportionment and satisfies the requirements of the Due Process Clause.[3]

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3 When, in this brief, we speak of apportioning ASARCO's income, we are talking about the income of the combined

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The constitutional principles, which ASARCO does not challenge, are well established. First, the income of a business operating in interstate commerce is not immune from fairly apportioned state taxation. *Northwestern States Portland Cement Company v. Minnesota*, 358 U. S. 450, 458-462 (1959); *Underwood Typewriter v. Chamberlain*, 254 U. S. 113, 120 (1920); *United States Glue Company v. Oak Creek*, 247 U. S. 321, 328-329 (1918). Second, "[T]he entire net income of a corporation generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." *Northwestern States Portland Cement Company v. Minnesota, supra* at 460. Third, before a state may tax income generated in interstate commerce, the Due Process Clause requires both a "minimal connection" between the interstate activities and the taxing state, and a rational relationship between the income attributed to the state and the intrastate values of the enterprise. *Moorman Mfg. Company v. Bair*, 437 U. S. 267, 272-273 (1978); *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U. S. 425 (1980). When income is earned from activities which are part of a unitary business conducted in several states, then the requirement that the income bear relation to the benefits and privileges conferred by the several states has been met. "These are the circumstances in which apportionment is ordinarily the accepted method." *Mobil, supra* at 445-446 and *Exxon Corp., supra* at 229. In order to carve out an exception of some income from apportion-

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group of ASARCO and the six combined subsidiaries. The income being apportioned is the combined income of all seven entities, and the apportionment factor is computed by using the property, payroll and sales of all seven. (J. S. App. p. 44a and J. A. pp. 55a-81a).

ment, the test established in *Mobil* was: "[A]ppellant must demonstrate something about the nature of this income that distinguishes it from operating income, a proper portion of which the State concededly may tax." *Mobil* at 437-438. In *Mobil* this Court found no such distinction. Finally, this Court has held that a taxpayer who attacks an apportionment formula carries a distinct burden of showing by "clear and cogent evidence" that it results in extraterritorial values being taxed. *Butler Bros. v. McColgan,* 315 U. S. 501 (1942).

The Idaho Supreme Court, after reviewing the factual record, simply concluded that ASARCO had not established that this contested income from intangibles was separate from its operating income. ASARCO had failed to clearly separate this contested income from its other operating income. The Idaho Court said:

> With respect to the dividends ASARCO received from Southern Peru Copper Corp.; M. I. M. Holdings, Ltd.; General Cable; Revere Copper; ASARCO Mexicana, S.A.; and Compania American Smelting, S. A., we conclude that the record does not contain clear and convincing evidence to rebut the statutory presumption and does not support the trial court's finding that those dividends were not business income.[4] For the years in question ASARCO owned a controlling or at least a very substantial interest in each of these corporations. They are all engaged in businesses closely related to ASARCO's mining and smelting operations and, with the exception of M.I.M., ASARCO did a substantial amount of business with them and provided them with a variety of technical services. The clear inference from these

4 The uniform act (UDITPA) uses the term "business income" to refer to income to be apportioned. The term "non-business income" refers to income allocated to a specific state rather than apportioned. (See *Idaho Code* § 63-3027 (a) at J. S. App. pp. 67a-68a).

> facts is that ASARCO's interest in these companies was not merely that of a passive investor but that this dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral and necessary part of its mining and smelting business. We recognize that M.I.M., for the years in question, seems to have operated independently of ASARCO and did little if any business with ASARCO. Although ASARCO owns a controlling interest in M.I.M., ASARCO did not exercise its right to control the corporation, apparently for political reasons. Nevertheless, ASARCO does own a majority of M.I.M. stock and M.I.M. is engaged in virtually the same business as ASARCO. Given these facts and the statutory presumption we conclude that the trial court erred in concluding that ASARCO's interest in M.I.M. was merely a passive investment unrelated to ASARCO's mining and smelting business. [J. S. App. pp. 22a-23a]

The Idaho Supreme Court did not permit the Idaho Tax Commission to apportion *all* of ASARCO's income from intangibles as the Commission had originally attempted to do. After careful consideration of the evidence, the Idaho Court concluded that ASARCO had clearly and convincingly established its ownership of shares of stock in some companies was not related to its mining and smelting business. [J. S. App. p. 23a]. These conclusions were part of the Idaho court's analysis of the statute. However, in its consideration of the constitutional issues, the Idaho court correctly perceived that the UDITPA provisions clearly conform to the requirements of the Due Process Clause. The court said:

> We believe that any constitutional limitations upon a state's right to apportion the intangible income, including dividends, of a multistate corporation doing business within the state are satisfied by the Idaho statutory requirement that the acquisition, manage-

> ment or disposition of the underlying asset must be an integral or necessary part of the taxpayer's unitary business, a part of which is conducted in this state. [Citations omitted] [J. S. App. p. 28a]

Thus, the Idaho court sustained the apportionment of intangibles, or income from intangibles, which it found were an integral part of a taxpayer's unitary business. Such apportionment of intangibles is neither new nor unique.[5] The unitary business principle has its beginnings in the ad valorem taxation of railroads, express companies, and similar interstate businesses. In the early case of *Adams Express Company v. Ohio State Auditor*, 165 U.S. 194 (1897), *rehearing denied* 166 U.S. 185 (1897), the court squarely addressed the apportionment of intangibles. In denying the express company's petition for rehearing, the Court, in 166 U. S. at 223, said:

> Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter.

This rule was later extended from property taxes to corporate privilege and income taxes. In *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911), the court stated:

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5 The terms "operating income" and "income from intangibles" imply a distinction that is inaccurate and misleading. The fact is, much of any company's operating income is from intangibles. The commonly used three factor apportionment formula determines income based upon a taxpayer's property, payroll and sales. This assumes that a taxpayer earns its income from the use of real and tangible personal property, the use of labor and the use of the marketplace. Two of these three elements—labor and the market—are themselves intangibles. The formula measures "wherever its tangible property is located and where its work is done." *Adams Express, supra*, 166 U. S. at 223.

> Nor can it be justly said that investments have no real relationship to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods, it may give a standing which shall facilitate purchases, it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige. (220 U. S. at 166)

In *Ford Motor Company v. Beauchamp*, 308 U. S. 331 (1939), this court again recognized that intangible properties contribute substantially to the business activities of multistate and multinational corporations conducted in various states:

> In a unitary enterprise, property outside of the state necessarily affects the worth of the privilege within the state. Financial power inherent in possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason, it is held that an entrance fee may be properly measured by capital wherever located. The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries, is but a recognition of the very real effect its existence has on the value of the privilege granted within the taxing state. (308 U. S. at 336)

In *Underwood Typewriter Company v. Chamberlain*, 254 U. S. 113 (1920), a tangible property apportionment factor was used to apportion to Connecticut a part of Underwood's entire federal taxable income including income from intangibles. In challenging the constitutionality of the apportionment formula, the taxpayer contended, in part, that the net income included income from intangibles not connected with its Connecticut manufacturing business or properties. Relying upon the concepts underlying the unitary business principle and focusing upon the validity

of the apportionment result, the court upheld Connecticut's apportionment of all Underwood's federal taxable income, including income from intangibles.

A number of cases hold that intangibles used by a business as a necessary or integral part of the business are taxable where the business activity relating to the intangibles occurs. See *First Bank Corp. v. Minnesota*, 301 U. S. 234, 236 (1937); *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 210 (1936); *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 213 (1930); *Beidler v. South Carolina Tax Commission*, 282 U. S. 1, 8 (1930); *First National Bank v. Maine*, 284 U. S. 312, 331 (1932). The rationale of these cases is that intangibles have their situs where the business activities to which they relate occur. However, if that business is a unitary business conducted in more than one state, then "the circumstances in which apportionment is ordinarily the accepted method" exist. *Mobil, supra* at 445-446 and *Exxon Corp., supra* at 229. Clearly, where the intangibles are part of the taxpayer's unitary business, the income earned from the intangible is no different than any other kind of operating income and it is subject to apportionment. The effect of ASARCO's position is to ask this Court to impose a different due process standard in the case of income earned from stockholdings than applies to other forms of income earned from intangibles. Nothing in *Mobil* justifies applying different due process standards to different kinds of income.

In all of the foregoing cases, intangibles were found to be part of a taxpayer's unitary business based upon the relationship between the intangible asset and the taxpayer's business. In *Mobil*, the Court looked to functional integration between Mobil's operations and the business operations of the dividend-paying subsidiaries in order to

conclude that there was a connection between the intangible assets held by Mobil which generated the income and Mobil's unitary business, a part of which was conducted in Vermont.[6] In so doing, the Court did not in any way modify or overrule any of the older cases cited above. In short, "functional integration" is not and cannot be the exclusive test for determining whether dividend income may be subjected to apportionment.

This Court's most recent decision, *Exxon Corporation v. Wisconsin Dept. of Revenue,* 447 U.S. 207 (1980), strongly supports this conclusion. In that case, this Court sustained Wisconsin's inclusion of all Exxon's functional departments as part of its unitary business subject to apportionment. These functional departments included exploration and production, refining, marketing, marine, coal and shale oil, minerals and land management. Only Exxon's marketing division conducted business in Wisconsin. However, because the activity conducted inside the state was part of Exxon's unitary business and because each of the activities conducted outside the state were also a part of that unitary business, apportionment of all of the income from all of these activities was sustained. In the present case, one of ASARCO's activties, conducted outside Idaho, is the acquisition, management and sale of certain intangible assets resulting in income in the form of dividends, interest and capital gains. The Idaho Supreme Court has similarly concluded that these activities are sufficiently related to ASARCO's other business activities, a part of which are conducted in Idaho, to make them part of ASARCO's unitary business and to justify

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6 As the dissenting opinion in *Mobil* observed (see footnote 9 at p. 456), several of the dividend-payor corporations would indeed appear to be companies not engaged in a unitary business with Mobil Oil Corp.

apportionment of that income. Substantial evidence from the record supports that conclusion. (See part I. (B), *infra*).

In summary, Idaho apportions all business income because the uniform act (UDITPA) does not attempt to locate business income by a geographical source, but rather attributes it by formula to where the taxpayer's underlying business is conducted as reflected by its tangible property, payroll and sales. Intangible properties by their very nature have no fixed situs. When intangibles are utilized in the taxpayer's business operations, it is perfectly reasonable and logical to attribute income derived from them to states where the business to which they are related is actually conducted by the taxpayer. This is all that UDITPA does. When income from intangibles is properly classified as apportionable business income under UDITPA, the due process connection is satisfied because that classificiation properly associates this income to the unitary business and apportions it to states where the unitary business is conducted.

(B) The evidence supports the Idaho Court's conclusion that ASARCO failed to prove by clear and cogent evidence that the income in question was separate from its unitary business.

In holding that the income from intangibles was statutorily and constitutionally apportionable, the Idaho court concluded that ASARCO had failed to prove by clear and convincing evidence[7] that these intangibles were not ac-

7 The Idaho statute requires that certain classes of income (including those at issue here) be presumed to be business income subject to apportionment unless shown to the contrary by "clear and convincing evidence." [*Idaho Code* § 63-3027 (a) (1). J. S. App. p. 67a] We believe this evidentiary standard is no different from the "clear and cogent evidence" standard set by this Court in *Butler Bros., supra,* and repeatedly applied since.

quired, managed and disposed of as a regular part of its trade or business. In so concluding, the court relied upon substantial evidence from the record. In regard to the five corporations whose dividends are challenged by ASARCO in this appeal, that record reflected the following:

Southern Peru Copper Corporation

This is an American corporation whose activities are confined to Peru in which ASARCO owned 51.5 percent. Minority shareholders were Phelps Dodge—16 percent; Newmont Mining—10.25 percent; and Cerro Corporation —22.5 percent. (J. A. p. 86a). ASARCO is a major customer of Peru Copper Corporation and that corporation is also an important supplier of raw materials to ASARCO. (J. S. pp. 43a-47a and p. 89a). Southern Peru produces blister copper, 20 to 30 percent of which is sold in Europe by the Southern Peru Copper Sales Corporation. (J. S. pp. 43a-47a and p. 89a). [The sales corporation is a tax device known as a western hemisphere trading corporation insulator. It allowed Southern Peru Copper Corporation to retain its favored federal tax treatment as a western hemisphere trading corporation. (Rptr's Tran. p. 119). The sales corporation's ownership is the same as that of Southern Peru (J. A. p. 86a), but it has no employees. All of its activities are performed by ASARCO's employees. (J. A. pp. 86a and 90a).] Of the production not sold in Europe, ASARCO receives 51.5 percent—a proportion equal to its ownership. (J. A. p. 86a). For the tax years in question (1968-1970), Southern Peru's sales to ASARCO ranged from amounts in excess of $49 million to amounts in excess of $64 million. (J. A. p. 89a).

ASARCO is entitled to elect six of the company's thirteen directors. Six more are elected by the other

shareholders and the remaining director is appointed by either the other directors or all the shareholders.[8] The testimony established that Southern Peru is an "important" source of raw materials for ASARCO. If it lost this source of supply, it would either have to replace it or be satisfied with a reduced volume of business.[9]

M. I. M. Holdings, Ltd.

ASARCO owned a controlling interest in this company which is engaged in mining, smelting and refining of nonferrous metals in Australia and operates a refinery in England. (J. A. pp. 86a-87a). ASARCO did not maintain any common officers or directors of M.I.M. but ASARCO's comptroller testified that this was only because the company operated successfully with Australian nationals and, therefore, ASARCO chose not to exercise its right to elect directors. (J. A. pp. 132a-133a). The company used ASARCO's furnace patent and obtained technical services from ASARCO. (J. A. pp. 133a-134a). It is engaged in exactly the same kind of business activity in Australia and England that ASARCO conducts in the United States. (J. A. pp. 134a-135a). Because shipping concentrates from Australia to the United States is not economic, in two of the three taxable years M.I.M. made only a little more than one percent of its total sales to ASARCO. (J. A. pp. 43a-47a).

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8 The record is in conflict on this point, indicating at one place the shareholders jointly select the 13th director (J. A. p. 91a) and at another point that the other 12 directors make the selection (J. A. p. 121a).

9 ASARCO's ownership of 51.5% of the stock in Southern Peru Copper Corp. is strikingly similar to Mobil's 10% ownership of the Arabian American Oil Co. (ARAMCO). See *Mobil, supra,* n. 5 at 430. Both companies serve as sources of raw materials for the shareholder's principal business in the United States.

General Cable Corporation and Revere Copper and Brass, Incorporated

General Cable and Revere Copper are customers of ASARCO (J. A. p. 27a) in which ASARCO owned approximately 34 percent of the stock. (J. A. pp. 29a and 135a). The remaining stock is widely held. (J. A. p. 135a). Revere Copper used an ASARCO patent and utilized ASARCO's stock transfer department. (J. A. p. 136a). These fabricators lacked their own source of raw materials. (J. A. p. 96a). The auditor's narrative (which the parties prior to trial stipulated was correct—J. A. 26a) concludes that the acquisition of this stock was "business motivated" in part because ASARCO voted its significant stock-holdings prior to being prohibited from doing so by the U. S. Justice Department (J. A. pp. 95a-96a). General Cable purchased from $30 to $45 million of ASARCO's product and Revere between $16 and $30 million of products each year. (J. A. pp. 43a-47a) ASARCO's controller admitted that these companies "make significant purchases from ASARCO" (J. A. p. 137a) and were "major customers" of ASARCO. (Rptr's Trans. p. 108).[10]

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10 The record refers to the anti-trust litigation brought against ASARCO relating to its holdings in General Cable and Revere Copper. (J. A. p. 95a) The case is *United States v. American Smelting and Refining Co., et al.*, Dk. No. 61 CIV 241 United States District Court, Southern District of New York. Part of the record there includes a "statement of consideration for the Support of Settlement of the Action" submitted jointly by counsel for the government and ASARCO's counsel. It states in part,

> . . . ASARCO's investments in Revere and Cable make a substantial contribution to ASARCO's financial strength, both because of the income that these investments produce and because by contributing to ASARCO's credit standing they facilitate the raising of capital for new investment.

ASARCO Mexicana, S. A.

This company mines and smelts lead and copper in Mexico. (J. A. p. 87a). ASARCO owns 49 percent of the stock. (J. A. p. 29a). The remainder is publicly held by Mexican nationals. At one time, ASARCO owned 100 percent of the company but in 1965 was required by Mexican law to divest itself of 51 percent of the stock. (J. A. pp. 129a-130a). ASARCO provides the company with technical services and acts as a sales agent for the company's sales outside of Mexico. (J. A. pp. 87a, 130a-131a). The corporation also uses ASARCO's valuable trademarks and tradenames. (J. A. p. 129a).

> Clearly, the Idaho Supreme Court's findings that . . .
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> . . . ASARCO's interest in these companies was not merely that of a passive investor but that this dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral necessary part of its mining and smelting business [J. S. App. p. 22a] . . .

is supported by substantial evidence in the record.[11]

Interest income and gains were earned from these same intangibles (J. A. pp. 51a-53a), therefore, the same result should obtain (See generally J. A. pp. 83a-96a). See *Xerox Corp. v. Comptroller of the Treasury*, 428 A. 2d 1208 (Ct. App., Md., 1981). Because there is evidence in the record to support the Idaho court's factual finding, this Court should not disturb that finding on appeal. *Cali-*

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11 The Idaho Supreme Court is not alone in its finding that the income was earned as a regular part of ASARCO's trade or business. The Montana Supreme Court reached the same conclusion in regard to the same taxpayer for the same taxable periods. *Montana Dept. of Revenue v. American Smelting & Refining Company*, 567 P. 2d 901 (Mont., 1977), appeal dismissed 434 U. S. 1042 (1978). The Montana assessments at issue in that case resulted from the same MTC audit upon which the Idaho assessments are based.

fornia Retail Liquor Dealers Assn. v. Mideal Alum, — U. S. —, 100 S. Ct. 937 at 947 (1980); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U. S. 157, 159-160 (1952); *First National Bank v. Louisiana Tax Commission*, 289 U. S. 60, 65-67 (1933); *Evco v. Jones*, 409 U. S. 91, 94 (1972).

To sustain its due process challenge, ASARCO must also show that the amount of income Idaho seeks to tax has no rational relationship to the intrastate values of the enterprise. *Moorman Mfg. Co. v. Bair, supra* at 272-273; *Mobil, supra*. ASARCO's entire case at the trial was based upon its own internal separate accounting. These separate accounting computations attributed losses to ASARCO's activities in Idaho (J. A. pp. 39a-40a). No other factual showing of purported overreaching by Idaho was attempted. A taxpayer's internal separate accounting records as a basis for impeaching a state's method of apportioning income has been uniformly rejected by this Court every time it has been raised. In *Underwood Typewriter Company v. Chamberlain*, 254 U. S. 113, 121 (1920), Mr. Justice Brandeis recognized "the impossibility of allocating specifically the profits earned by the processes conducted within its borders." In *Butler Bros. v. McColgan*, 315 U. S. 501 (1942), the court stated:

> [W]e need not impeach the integrity of that accounting system to say it does not prove appellant's assertion that extraterritorial values are being taxed."

In *Mobil, supra*, the Court recognized that:

> Separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale.

Separate accounting as a method of impeaching the state's apportionment result was again rejected in *Exxon*

Corp. v. Wisconsin Dept. of Revenue, 447 U. S. 207 (1980). *See also* Dexter, "The Unitary Concept in State Income Taxation of Multistate-Multinational Business" 10 *The Urban Lawyer* 181 (1978).

Accordingly, ASARCO's effort to discredit Idaho's apportionment result by means of its separate accounting evidence is inadequate and was recognized as such by the Idaho Court (J. A. App. 30a-31a).

Idaho has instead apportioned income based on the amount of ASARCO's income producing activity in Idaho as compared to its income producing activity everywhere—measured by its property, payroll and sales. Because by this measure approximately 2.5% of ASARCO's activity occurs in the state (J. A. pp. 59a, 67a, 75a), Idaho has taxed approximately 2.5% of its income.[12] Nothing about this apportionment has been shown to be unreasonable.[13]

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12 This approximate 2.5% Idaho apportionment factor is a maximum. The amount of the sales factor under Idaho law remains an unresolved issue which the Idaho Supreme Court remanded to the district court for further consideration. (J. S. App. pp. 33a-35a).

13 Instead, the amount of income attributed to Idaho (even before reduction to reflect the income found by the Idaho Court to be non-apportionable) seems entirely consistent with reasonable expectations. Measured as a return on ASARCO's original investment in Idaho property, it is a modest annual return of less than 12%. This return is computed as follows (parentheticals refer to pages of the Joint Appendix):

Year	Idaho Property	Idaho Income	Return (%)
1968	$14,948,099 (63a)	$1,541,198 (59a)	10.31%
1969	15,091,707 (71a)	2,274,750 (67a)	15.07%
1970	20,436,788 (79a)	2,162,346 (75a)	10.58%
Total	50,476,594	5,978,294	11.84%

When the Idaho income figures are recomputed to reflect exclusion of income classified as non-apportionable by the Idaho court and any reductions to the Idaho sales factor that may result from the Idaho court's remand of that issue, the return percentages computed above will be smaller.

Accordingly, this Court should affirm that the decision of the Idaho Court complies with the requirements of the Due Process Clause of the Fourteenth Amendment.

II.

The Standard Three Factor Formula provided by UDITPA and used by Idaho reaches a proper apportionment result in this case without any special adjustments being applied.

As an alternative argument, ASARCO suggests in part II of its brief that either the Due Process Clause or the Foreign Commerce Clause require that the factors used to apportion income must be modified to reflect the activities of the dividend payor corporation. These positions are both unsupported by any acceptable evidence and misapply this Court's ruling in *Mobil*. Because the unitary income is ASARCO's own income, it need only be apportioned based upon ASARCO's own business activities. That is the result accomplished by application of the standard three factor formula. The Due Process Clause requires no more. In fact, the adjustments proposed by ASARCO achieve illogical results which are contrary to the unitary business principle and inconsistent with the Due Process Clause. ASARCO's commerce clause challenge was fully considered and rejected by this Court in *Mobil*. Despite ASARCO's attempt to distinguish its issue from that decided by this Court in *Mobil*, there is no real difference.

(A) Nothing in the Due Process Clause requires that the UDITPA apportionment factors be modified in this case.

ASARCO contends that if the questioned dividends are apportioned, then the Due Process Clause requires that certain adjustments be made to the property, payroll and sales factors used to apportion that income. Specifically, ASARCO contends that a part of the property, payroll

and sales of the dividend-payor corporations must be added to the denominators of its own apportionment factors (See Appellant's brief, pp. 27-37). ASARCO premises its position on two demonstrably false premises: first, that this Court in *Mobil, supra,* prohibited the apportionment of dividends unless they are received from a corporation conducting a business functionally integrated with the payee; and, second, that this Court's conclusions in *Mobil, supra,* require apportionment formula results which approximate a result comparable to a "combined report" of taxable income.

We have already discussed in part I of this brief the appropriate constitutional criteria for apportioning dividends and other income from intangibles. We have demonstrated that the apportionment depends upon the relationship between the acquisition, management and disposition of the intangible asset and the overall unitary business activities of the payee corporation. We will discuss later in this part of this brief the relationship between the apportionment of dividends and "combined reporting."

In addition to these points, it is important to recall ASARCO's burden. ASARCO must show, by clear and cogent evidence, that the apportionment method used by the state clearly results in the taxation of extraterritorial values. *Butler Bros. v. McColgan, supra,* 315 U. S. at 507. As we observed earlier, the only evidence submitted by ASARCO at the trial was based upon its internal separate accounting results. A taxpayer's internal separate accounting is, as we have shown before, insufficient to impeach the state's apportionment result (See part I(B) above). Appellant argues that, because apportionment results in an amount of income attributable to Idaho substantially more than its separate accounting records indi-

cate is proper, the apportionment must be "inherently arbitrary" and therefore unconstitutional (See Appellant's brief, pp. 36-37). Nothing further by way of proof of taxation of extraterritorial values is offered either in Appellant's brief or anywhere else in the record in this case. Accordingly, the Idaho Court correctly concluded that this separate accounting analysis does not sustain the required burden (J. S. App. p. 31a). The taxpayer must make a factual showing which meets the clear and cogent evidence rule. Any adjustments to the apportionment factors which may be appropriate are not required automatically as a matter of law. Otherwise, Mobil Oil Corporation would have been entitled to such adjustments even though it attempted no factual showing of disproportionate taxation by Vermont. It was this lack of showing which—at least in part—caused this Court to defer ruling on the issue in that case. (See *Mobil,* supra, n. 16 at p. 442 ". . . the absence of evidence in the record to decide the issues on which the dissent speculates . . . cuts against and not in favor of appellant's cause.") If this Court rejects—as the Idaho court correctly did—ASARCO's separate accounting evidence, the record in this case is equally devoid of any attempt to show taxation of extraterritorial values.

In any event, there is nothing conceptually inconsistent about applying the UDITPA apportionment formula, without adjustment, to income earned from intangibles acquired, managed and disposed of as a regular part of a taxpayer's unitary trade or business. First, ASARCO cannot ignore the fact that it is a separate and distinct taxpayer from the dividend-payor corporations and that the taxation of dividends is distinct and separate from the taxation of the underlying profits of the payor corpora-

tions. See *Moline Properties, Inc. v. Commissioner,* 319 U. S. 436 (1943); *In re Goodyear Tire & Robber Company,* 133 Vt. 132, 335 A. 2d 310 (1975); and *Gulf Oil Corp. v. Morrison,* 120 Vt. 324, 141 A. 2d 671 (1958). The Idaho court's decision correctly perceives this important legal principle. The Idaho court ruled:

> The commission did not levy a tax upon the income of the dividend-paying corporations; rather, it levied a tax upon ASARCO's income. Those dividends are clearly part of ASARCO's income and it is unquestioned that there is a sufficient connection between ASARCO and this state to constitutionally permit the state to tax its proper share of ASARCO's income. If the due process clause were to prohibit the inclusion of dividends in a taxpaytr's taxable income unless the payor corporation also conducts business within the taxing state, the due process clause would logically also prohibit the taxpayer's domicile from taxing those dividends if the payor corporation did not conduct its business within the domiciliary state, and indeed it would prohibit the United States and any state from ever taxing dividends paid the taxpayer by a corporation whose activities are located entirely without this country. The due process clause simply does not limit the right to tax dividends paid a taxpayer to the jurisdictions in which the payor corporation conducts its business. We believe that any constitutional limitations upon a state's right to apportion the intangible income, including dividends, of a multistate corporation doing business within the state are satisfied by the Idaho statutory requirement that the acquisition, management or disposition of the underlying asset must be an integral or necessary part of the taxpayer's unitary business, a part of which is conducted in this state. [Citations omitted] [J. A. App. p. 28a].

This Court in *Mobil* did suggest that some apportionment relief may be required if the dividends are from payor corporations which conduct an integrated unitary business

with the payee corporation. The Idaho statutory scheme —and indeed the decisions of both the Idaho trial court and the Idaho Supreme Court in this case—recognizes the activities of the functionally integrated subsidiaries. The State District Court concluded that six of ASARCO's wholly owned subsidiaries conducted a unitary business with ASARCO and, therefore, combination of these subsidiaries was necessary to "accurately reflect plaintiff's income within the state of Idaho" (J. S. App. pp. 44a and 36a). ASARCO did not appeal that determination.[14] Although this Court did not address the validity of combined reporting in its *Mobil* decision, it did recognize that,

> "A necessary concomitant of [combination] would be inclusion of the subsidiaries' and affiliates' sales, payroll, and property in the calculation of the apportionment formula . . . the result, presumably, would be advantageous to appellant, since virtually nothing would be added to the 'Vermont' numerators of the apportionment factors, while there would be substantial increases in the 'everywhere' denominators, resulting in a diminution of the apportionment fraction." (See *Mobil, supra,* n. 15 at p. 441).

Idaho statutorily provides for combined reporting. See *Idaho Code* § 63-3027(s) (J. S. App. p. 73a). The Idaho court explained that this section applies when several corporations are engaged in a functionally integrated business activity. The Idaho court said:

> The combined reporting provision of subsection (s) is a further refinement of the basic apportionment principle. Its purpose is to permit application of the UDITPA apportionment formula to a single business

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14 The validity of the "combined report" is before this Court in the case of *Chicago Bridge and Iron, et al. v. Caterpillar Tractor Co., et al.,* Prob. juris. noted — U. S. — Nov. 9, 1981, Dk No. 81-349 U. S. Supreme Court, which is to be heard the same day this case is argued.

> enterprise which is conducted by means of separately incorporated entities. [citation omitted] In an economic sense, such a business is no different than a similar business composed of a single corporation with several separate divisions. [citations omitted] (J. S. App. 21a).

Therefore, the Idaho statutory scheme, as interpreted and applied by the Idaho courts, provides apportionment modification when two or more corporations are engaged in a single unitary business. This is precisely the circumstance in which ASARCO contends that apportionment modification is required. However, ASARCO admits that the five dividend payor corporations at issue in this appeal are *not* conducting a unitary business with ASARCO. (Appellant's brief, pp. 18-25). Because these companies were not engaged in a single unitary business together with ASARCO, including them in a combined report is inappropriate. *Edison California Stores, Inc. v. McColgan,* 176 P. 2d 697 (Calif., 1947). Instead, as we have shown, because the intangible assets generating this income were related to ASARCO's own unitary business, the dividends may be apportioned among those states in which ASARCO's unitary business is conducted. Because the unitary business is ASARCO's business—not the payor corporation's business—reflecting the payor's property, payroll and sales in the payee's apportionment formula is illogical.[15]

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15 We do not intend to imply that adjustment of the apportionment factors is required in a state (such as Vermont) not recognizing the combined reporting method. Instead, Idaho's statutory scheme provides for combined reporting in the case of corporations conducting a single unitary business in more than one state. This system recognizes the property, payroll and sales of all the corporations included in the unitary group. This aspect of the Idaho statute refutes ASARCO's claim that Idaho does not recognize the

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Combining, for income tax reporting purposes, and apportioning income earned from business assets are conceptually distinct and are intended to achieve different results. We cannot improve on the Idaho court's explanation of this legal distinction. That court said:

> . . . [T]he district court seems to have concluded that since the corporations which paid the dividends were not sufficiently connected with ASARCO's business operations to justify combining those corporations with ASARCO for tax reporting purposes pursuant to I. C. § 63-3027 (s), the stock ASARCO owned in those corporations was *ipso facto* not an integral or necessary part of ASARCO's trade or business so as to justify including the dividends they paid ASARCO as part of ASARCO's apportionable business income under I. C. § 63-3027(a)(1). When corporations are combined under subsection (s) for tax reporting purposes, the dividends paid one corporation by the other are not considered income but, as the commission did in this case, are properly treated as intracompany transfers. The district court's reasoning, therefore, would preclude dividends from ever being classified as business income and is thus clearly inconsistent with subsection (a)(1) which presumes that dividends are business income. The effect of this reasoning would nullify the statutory provision, a result we must avoid if possible. [Citation omitted]
>
> However, these provisions are not necessarily inconsistent. They have different objectives and they can be read harmoniously if those objectives are kept in mind. The combined reporting provision of subsection (s) is a further refinement of the basic apportionment principle. Its purpose is to permit appli-

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income-producing activities of unitary subsidiaries. The combined reporting method is, for a number of reasons, superior to attempting to adjust the apportionment factors. (See, *infra*, pp. 32-38) If recognition of the income-producing activities of a unitary subsidiary is constitutionally required, then this Court should require the use of combined reporting rather than the adjustment of apportionment factors.

cation of the UDITPA formula to a single business enterprise which is conducted by means of separately incorporated entities. [Citation omitted] In an economic sense such a business is no different than a similar business composed of a single corporation with several separate divisions. [Citations omitted] For tax reporting purposes such businesses should be treated the same. [Citations omitted]

In contrast, subsection (a)(1), which authorizes the apportionment of a taxpayer's dividend income in certain circumstances, addresses a very different question. While the combined reporting provision concerns a proper identification of the contours of the business enterprise, the business income definition of subsection (a) (1) concerns the differentiation between truly passive investment income and income which is incidental to or connected with the taxpayer's business operations. These are two related but conceptually and legally very different questions. Simply because the management, operation and activity of a corporation in which the taxpayer owns stock is not so closely connected with the management, operation and activities of the taxpayer to warrant a combined tax return, does not *ipso facto* mean that the dividends the taxpayer receives from that stock cannot be "income arising from transactions and activities in the regular course of the taxpayer's trade or business" and that the "acquisition, management, or disposition" of the stock does not "constitute integral or necessary parts of the taxpayer's trade or business operations." I. C. § 63-3027 (a) (1). The combined reporting provision and the business income definition serve different purposes, ask different questions and apply different standards. The answer to one does not necessarily imply the same answer to the other. (J. S. App. pp. 20a-22a).

See also: Keesling, "A Current Look at the Combined Report and Uniform Allocation Practices", 41 J. Tax. 106 (1975).

In summary, the only basis for the factor adjustments proposed by ASARCO is its position that dividends cannot

be apportioned unless the payor and the payee are together engaged in a unitary business. As we have shown, the Due Process Clause does not limit apportionment of dividends to that circumstance. Under the statutory scheme in Idaho, corporations engaged in a unitary business will be combined. Intercompany dividends and other payments will be eliminated and the factors of all members of the unitary business will be reflected in the apportionment formula. Income from intangibles which is earned as a regular part of that unitary business will be apportioned by formula to all of the states (and foreign jurisdictions) in which the unitary business conducts its activities. These are the two different aspects of the unitary business principle. Combined reporting defines the identity of the unitary business (which is made up of two or more corporations). The definition of apportionable business income determines the amount of income earned by that unitary business which may be apportioned.

ASARCO's suggested adjustments to the apportionment factors would lead to highly anomalous results. The practical substantive result would be to virtually exempt dividends from state taxation if the ratio of the property, payroll and sales of the payor corporation to that income equal the same ratio of the payee corporation. To the extent that this ratio of the payor exceeded that of the payee, it would reduce income of the payee attributable to the taxing state below that otherwise attributable if the dividends had been excluded from taxable income.

The following example illustrates this anomaly:

> Assume a corporation, "Parent A", has net income of $1,500; $500 of which is dividends from its 50% ownership in "Subsidiary B." If an average 10% of A's activities, as measured by the extent of its property, payroll and sales, are in Idaho, it will have a

10% total Idaho apportionment factor. Application of that factor to the income subject to apportionment yields $100 of net income attributable to Idaho if the dividends are excluded from apportionable income and $150 if dividends are apportioned. Assume further that Subsidiary B has no business activities in Idaho but does have a net income of $2,000 from which its dividends were paid. Sudsidiary B also has $2,000 each of property, payroll and sales—all outside of Idaho. Addition of any part of its property, payroll or sales to the computation of Parent A's Idaho apportionment factor will result in obvious distortion. Parent A's apportionment factor for Idaho is computed as follows:

Factors of the Formula	Amount Everywhere	Amount in Idaho	Idaho Percentage
Property	$1,000	$ 50	5%
Payroll	1,000	100	10%
Sales	1,000	150	15%
Total Idaho apportionment factor (Average)			10%

Income apportioned to Idaho:

(A) With dividends: $1,500 x 10% = $150
(B) Without dividends: $1,000 x 10% = 100

If the apportionment formula of Parent A is modified, as ASARCO says is constitutionally required, the everywhere amounts of the property, payroll, and sales factors of Parent A would each be increased by $500 since each of B's factor is $2,000 and 25% of these factors would be includable in the denominators of Parent A since the dividends of Parent A equal 25% of the profits of Subsidiary B.

This would result in attributing 1/15th of Parent A's net income of $1,500 to Idaho or *$100*—The exact result that would be achieved if the dividends were excluded from Idaho apportionable income or exempt.

In the foregoing example, if the everywhere property, payroll and sales of Subsidiary B are assumed to each be $2,400, the net income apportioned to Idaho, by inclusion of dividends, under ASARCO's argument, would be 1/16th

of $1,500 or $93.75. This is $6.25 *less* than if dividends are totally excluded from apportionable income or exempt.

This example illustrates a basic fallacy of the adjustment to the apportionment factors ASARCO argues is constitutionally required. The inclusion of dividends in apportionable income is *not* the taxation of the underlying profits of the payor corporations. The *Mobil* Court specifically held that Vermont was entitled to tax a share of the dividends as part of Mobil's unitary income. This share cannot be zero or less than zero.

If states are entitled to include dividends in apportionable income because the stock investments are related to the unitary business of the taxpayer carried on in part in their borders (the express holding in *Mobil*), there is no logical reason why the three-factor UDITPA apportionment formula does not properly assign this income when the formula includes the factors of the taxpayer's entire unitary business.

The justification for inclusion of dividends or other income from intangibles in apportionable income is that this income is from intangibles which are related to a taxpayer's overall business activities. The apportionment formula, without modification, apportions income to those jurisdictions in which the taxpayer conducts its business activities. Income under the statute is classified as business income, subject to apportionment, *only* in circumstances in which it is properly attributable to where the taxpayer carries on its business activities. The apportionment formula assigns this income to these business activities by the property, payroll and sales factors. Reasonable and constitutional apportionment requires no more.

Another difficulty with ASARCO's proposed adjustment to the factors is that the total apportionment factor

thus computed would be applied not just to dividend income but to the taxpayer's operating income as well. If there is any logic at all (and we contend there is not) to applying the dividend payor's property, payroll and sales factors to the payee's dividend income, there is even less logic to applying a dividend payor corporation's property, payroll and sales factor to measure the payee corporation's source of operating income.

Still another conceptual difficulty is that the total dividends paid by a corporation will normally be less than the corporation's current income. The payor corporation must retain sufficient earnings to pay its foreign, federal and state taxes and to fund capital expenditures and expansions. [A factor completely ignored in the illustrations contained in ASARCO's brief (Appellant's brief, pp. 29-30).] Diviends might not be paid in the same year in which the payor corporation received the income from which the dividends arise. Occasionally, the amount of dividends might even exceed the payor corporation's current income. See Keesling "The Impact of the *Mobil* Case on Apportionment of Income" 1981 *Brigham Young University Law Review* 87 n. 37 at 102. In all of these circumstances, the property, payroll and sales factors of the payor corporation for the year in which the dividend is paid would bear no rational relationship to the amount of the dividend under any interpretation of the Due Process Clause.

Requiring ASARCO's proposed adjustments to the apportionment factors also has the effect of attributing part of ASARCO's income to jurisdictions in which it conducts no business activities and, therefore, in which it can earn no income. This problem is demonstrated by the following illustration:

Assume that Corporation X does business in two states—Idaho and Oregon. It conducts no business activities, owns no property, sells no products nor employs any person beyond the boundaries of those two states. Corporation X owns 49 percent of the stock of Corporation Y which confines all of its business activities to Wyoming. Corporations X and Y are not themselves engaged together in a unitary business but X holds its interest in Y for a clearly business purpose—e.g., assuring itself a source of raw materials.

ASARCO's contention would lead to the result that 49 percent of Corporation Y's Wyoming property, payroll and sales would be added to the denominators of Corporation X's property, payroll and sales both in Idaho and in Oregon in each year Y pays dividends to X. The Idaho numerators and the Oregon numerators would remain unchanged. These factors would then be averaged to determine the total apportionment percentage for such state. If the resulting Idaho and Oregon total apportionment factors are added together, they will not equal 100 percent. (Because the numerators of the Idaho and Oregon factors, when added together, will not equal the denominators.) But in our illustration, Corporation X conducts business activity in no state other than Idaho and Oregon. Accordingly, it must follow that all of its taxable income must be earned in those two states. What has happened to the remainder of the income? The addition of Wyoming property, payroll and sales values to Corporation X's denominators has in effect caused some of the income to be attributed to Wyoming—a state in which Corporation X has no tax situs and conducts no business activities. It seems obvious that Corporation X, because it conducts no business activities whatsoever in Wyoming, cannot be said to have earned taxable income in Wyoming. ASARCO's formula does exactly what ASARCO itself admits is unconstitutional; it attributes income to a place where it is not—and cannot be—earned.

ASARCO's brief (n. 27 at p. 33) attacks this illustration on the premise that it is entirely proper under *Mobil* for some of Corporation X's income to be attributed to Wyoming. This is a manifest distortion of the due process requirements. In the illustration, all of Corporation X's income must be earned in Idaho and Oregon. But ASARCO's apportionment formula would attribute some of X's income to Wyoming. If this were correct, then it would be possible for Wyoming to tax not only 100% of Corporation Y's net income (because Corporation Y conducts its business solely in Wyoming), but also an apportioned share of X's income (i.e., the part not attributed to either Idaho or Oregon). However, the Due Process Clause will not permit Wyoming to tax any of X's income because it has no business situs in that state, and therefore, the "minimum connection" requirement would not be met. See *Moorman Mfg. Company v. Bair*, 437 U. S. 267, 272-273 (1978).

If, in our illustration, Corporation X and Corporation Y were functionally integrated and together conducted a unitary business in Idaho, Oregon and Wyoming, then it would be appropriate for the total net income of the combined group of Corporation X and Y to be apportioned among those three states based upon the property, payroll and sales of both corporations. But in our illustration such unity of operation does not exist; instead, the intangible asset is held for a business purpose related to Corporation X's business activities in Idaho and Oregon. To apportion all of the income earned from that intangible asset to Idaho and Oregon does not offend the Due Process Clause because it attributes X's unitary income to the places where X's unitary business is conducted. That is what the Due Process Clause re-

quires and no adjustment to the formula is needed to accomplish that result.

Similarly, ASARCO here seeks in effect to attribute part of its own income to Peru, Mexico and Australia. For all that can be determined from the record, these are jurisdictions in which ASARCO conducts little or no business activities. There is, therefore, no due process requirement that some of its income must be apportioned to those jurisdictions.

It is not inappropriate to note the complex administrative and compliance problems posed by ASARCO's position. Many multinational corporations receive dividend income from hundreds of subsidiary or affiliated corporations.[16] Under ASARCO's reasoning, proportionate property, payroll and sales information of each of these corporations must be determined to compute the apportionment factors in each state in which the dividend payee corporation files a state income tax return. In the case of foreign corporations in which the taxpayer is a minority shareholder, this information may not even be available to it.

In summary, there is no due process requirement that Idaho adjust the UDITPA factors to reflect the property, payroll and sales of dividend payor corporations. Although these corporations may not be engaged in a unitary business with ASARCO, the intangible assets generating the dividend income (i.e., the shares of stock) are acquired, managed and disposed of in the regular course of ASARCO's own unitary business, a part of which is con-

16 In 1974, 666 U. S. corporations with assets of at least $250 million controlled 11,346 foreign corporations having before tax earnings and profits. See IRS Publication 1026 "Supplemental Report, Statistics of Income—1974-1978, International Income and Taxes, U. S. Corporations and Their Controlled Foreign Corporations."

ducted in Idaho. Because the income is, therefore, part of ASARCO's unitary business income, that income may be apportioned among all of the states in which ASARCO conducts its business activities. The three factors of property, payroll and sales—without adjustment—accomplish that result. The Due Process Clause requires nothing more. Instead, to effect the factor adjustments proposed by ASARCO would accomplish anomalous and illogical results which are contrary to the unitary business principle and the requirements of the Due Process Clause.[17]

(B) Idaho's apportionment of ASARCO's income is not a violation of the "Foreign Commerce" Clause of the Federal Constitution.

In Part II (B) of its brief, ASARCO argues that Idaho is attempting to subject it to multiple taxation because its foreign source dividends and interest were actually subjected to foreign withholding taxes.

There are several difficulties with this argument. The most obvious is that the record is utterly devoid of any evidence establishing that such taxation actually oc-

17 Appellant's brief cites (at n. 24, p. 31) a recent article by MTC Executive Director Eugene Corrigan entirely out of context. The article says that states which do not fully apply the unitary business principle as part of their income tax law are failing to receive the share of income—and thus revenue—that is fairly due them. See, Corrigan "Mobilizing Interstate Taxation, *Tax Notes* Vol. XIII, No. 15, Oct. 12, 1981, p. 808. Apportioning dividends will, in some cases, result in more revenue than use of a combined report. In fact, in this case the Idaho Tax Commission had originally assessed ASARCO additional taxes based upon an apportionment of dividends from *all* companies in which ASARCO owned stock. This assessment was amended based upon the audit report's conclusion that six of the subsidiary corporations were engaged in a unitary business together with ASARCO and therefore should be included in a combined report. (J. A. p. 87a) This combination resulted in a *reduction* of taxes—just as the Corrigan article predicts that it should. (Rptr's Tr. pp. 222-226).

curred. ASARCO's argument is now more narrow than it originally presented to the Idaho court; it applies to foreign commerce only and not to interstate commerce. This narrowing of its argument does not change the correctness of the Idaho court's original ruling:

> The essence of ASARCO's argument under the commerce clause is that since Idaho's use of the UDITPA apportionment formula may result in duplicative taxation of its income by other states, the statute places an unconstitutional burden on interstate businesses. In particular, ASARCO emphasizes that since many states allocate income from intangible and tangible property to a single jurisdiction, the apportionment by Idaho of this same income will result in multiple taxation. However, *ASARCO has not established that it was in fact subject to multiple taxation* and the possibility of such multiple taxation has been rejected as a grounds for invalidating an apportionment statute. [Emphasis added] (J. S. App. p. 32a).

The factual record before this Court is unchanged. That record is devoid of any evidence showing multiple taxation on either an interstate or a foreign level. In fact ASARCO's foreign taxation argument first appeared in its first jurisdictional statement to this Court (in case number 78-1839) and appears to owe its origin to *Japan Lines Ltd. v. County of Los Angeles*, 441 U. S. 434 (1979), which was decided after the Idaho court's first decision. It is clear that the taxpayer must prove that the risk or actuality of foreign taxation exists. See *Northwestern States Portland Cement Company v. Minnesota*, 358 U. S. 450 (1959); *General Motors Corp. v. Washington*, 377 U. S. 436, 449 (1964); *Standard Pressed Steel Company v. Department of Revenue of Washington*, 419 U. S. 560, 563 (1975); *Moorman Mfg. Co. v. Bair*, 437 U. S. 267 (1978).[18]

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18 In its brief, ASARCO speaks only of the tax laws of Mexico and Australia. As we have noted, the record is utterly

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In any event, ASARCO's argument is without substantive merit. ASARCO, like Mobil, bases its argument on this Court's holding in *Japan Lines Ltd., supra.* However, *Mobil* clearly rejects each of the positions asserted by ASARCO. (See *Mobil, supra,* at 446-449). This Court rejected Mobil's same analogy to *Japan Lines* as "forced" for good reason. (*supra* at 448). The case can be easily distinguished. In *Japan Lines,* this Court determined that an ad valorem property tax imposed on foreign owned shipping containers violated the Foreign Commerce Clause primarily because the containers were instrumentalities of foreign commerce which had been taxed in Japan and were by treaty immune from "all duties and taxes whatsoever chargeable by reason of importation" (441 U. S. at 453). No such circumstance exists in this case. No treaty directly or indirectly limits or restricts the authority of a state to use the unitary business principle for appor-

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devoid of evidence showing foreign taxes were paid to any of these countries—or if they were paid, by which corporations or in what amount. The best we can do from the record is *assume* that, if any taxes were paid, ASARCO Mexicana paid taxes to Mexico and M. I. M. Holdings to Australia. This fails to account for three of the dividend payor corporations—Southern Peru, General Cable and Revere Copper. Additionally the withholding taxes in question may or may not apply to the interest or capital gains at issue (although a 10% tax on interest may apply in Mexico). The absence of an adequate factual record makes this issue speculative at best. Before attempting to rule on the effects of such foreign taxation, this Court should insist on a record which contains evidence establishing that the taxes were in fact paid, to which countries they were paid, by which corporations they were paid, the legal incidence of the taxes (e. g., do they apply to interest

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tioning income.[19] Nor, as this Court recognized in *Mobil*, has Congress clearly enunciated a federal policy in this area:

> Congress in the future may see fit to enact legislation requiring a uniform method for state taxation of foreign dividends. To date, however, it has not done so. (*Mobil, supra* at 449).

Idaho's tax in this regard is similar to Washington's business and occupation tax discussed in *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U. S. 734 (1978):

> [T]he tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States. (435 U. S. at 754).

Additionally, any such treaty or federal foreign policy, if it existed, would be irrelevant in this case. Treaties establish how foreign corporations are to be taxed by the United States or how U. S. taxpayers are to be taxed by a foreign power. ASARCO is a U. S. corporation (J. A. p.

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and capital gains?) and the amount of taxes that were actually paid.

19 The only effort to negotiate a treaty containing such a restriction was a provision, limiting state power to use the unitary business principle, inserted into the United States-United Kingdom Tax Treaty. The United States Senate refused to ratify the U. S.-U. K. treaty until those restrictions on state authority were removed. See Article 9 (4) of the Proposed Treaty, 124 Cong. Rec. 18402-18430, 18651-18670 and 19076-19078 (1978). This express refusal by the Senate to ratify a treaty which restricted states' authority to use the unitary method refutes ASARCO's position (see n. 25, p. 45 of its brief) that a contrary policy should be inferred from policies adopted for federal tax purposes.

54). At issue here is how a state of the United States is to tax the income of a U. S. taxpayer—not a question of international law or foreign policy at all. This Court recognized in *Mobil* that the Appellant's argument

> . . . attempts to focus attention on the effect of foreign taxation when the effect of domestic taxation is the only real issue. (*Mobil, supra* at 447).

Because the issue presented is a matter of domestic taxation only, there is no effect on the principal concerns expressed by this Court in *Japan Lines.* That is, there is no impairment of "federal uniformity in an area where federal uniformity is essential" nor is there a prevention of the federal government's ability to speak with "one voice" on the regulation of foreign commerce (*Japan Lines, supra,* 452).

ASARCO attempts to avoid the *Mobil* ruling by suggesting that it "now asserts the Foreign Commerce Clause argument which *Mobil* refrained from making—namely, that *any* 'local duplication of foreign taxes is prescribed' " (Appellant's Brief, p. 38).[20] However, because the issue is one of domestic—not international—taxation, ASARCO's restatement of the issue does not distinguish either *Mobil* or *Japan Lines.*

Finally, the tax policies established by the Internal Revenue Code evidence no intent by Congress to limit or restrict state taxes. The statutory scheme imposing income taxes at the national level and related treaties were never intended to limit a state's power to impose an apportioned net income tax on a multinational corporate en-

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20 In fact, the argument that ASARCO makes here was raised in *Mobil,* not by the taxpayer but by the amici curiae supporting the taxpayer's position. (See Brief of Committee on State Taxes of the Council of State Chambers of Commerce.)

terprise conducting substantial business activities within its borders. Under the federal tax laws, the entire net income of a domestic corporation, whether received from foreign or domestic "sources," is subject to federal income tax. For that reason, as a matter of policy, in order to avoid duplicative taxation at the *national* level of earnings derived from sources outside of the United States, the federal government allows a foreign tax credit (if elected in lieu of a deduction) for foreign income taxes paid directly by domestic corporations (I. R. C., § 901). The credit may not exceed the amount of the federal income tax imposed on the corporation's "foreign source income" as determined under §§ 862 and 863 of the Internal Revenue Code.

These provisions are relevant to avoid duplicative taxation of the entire worldwide income of a domestic corporation at the national level. They are irrelevant to an apportioned state net income tax, which by definition reaches only earnings fairly attributable to a corporation's activities within the borders of the taxing state. They were not intended to, and have never been interpreted as, precluding a properly apportioned net income tax at the state level.

The Internal Revenue Code provisions dealing with the classification of income from sources within or without the United States cover not only dividends but virtually all forms of income, including interest, rents, royalties, compensation for services, and sales income (see I. R. C., §§ 861-863). If the argument that the federal policies underlying the foreign tax credit require that "foreign source" dividends receive special state tax treatment were accepted, it is difficult to see why special rules

would not also be dictated for "foreign source" interest, royalties and sales income of a multinational taxpayer. The opinion in *Mobil* recognized this problem:

> Second, nothing about the logic of Mobil's position is limited to dividend income. The same contention could be advanced about any income arguably earned from foreign commerce. If appellant's argument were accepted, state taxing commissions would face substantial difficulties in attempting to determine what income does or does not have a foreign source. (*Mobil* at 447).

State income taxes have always been imposed in addition to the federal income tax, albeit at a fraction of the rate of that imposed by the federal government. States have never been required by statute or treaty to grant a credit for income taxes paid to either the United States or to any foreign country, so long as the corporation's net income was fairly apportioned to activities within the state. The fact that a credit for foreign income taxes may be allowed under federal law with respect to "foreign source income" is a matter relevant to federal, not state, income tax policy. A properly apportioned state net income tax imposed in addition to any national income taxes does not constitute duplicative *state* taxation of income arising from interstate and foreign commerce. It is duplicative taxation of income *among the states* that is the concern of the commerce clause, and such duplication is precluded by a rule of fair apportionment.

This Court recognized in *Mobil* that "Concurrent federal and state taxation of income, of course, is a well established norm." 445 U. S. at 448. There is no reason to prohibit concurrent taxation by states and foreign gov-

ernments, when it exists as an "established norm" in regard to state and federal taxes.[21]

CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the Idaho Supreme Court without change.

DATED January 15, 1982.

Respectfully submitted,

THEODORE V. SPANGLER, JR.

Deputy Attorney General
State of Idaho

21 Compared to the U. S. federal tax, the Australian and Mexican taxes are small; 15% in Australia, 10% in Mexico (Appellant's brief pp. 37-38). These foreign taxes are fully creditable against the federal income tax ASARCO pays in the United States. IRC §§ 901-905. This credit eliminates any impact the foreign tax may have on ASARCO. The only duplication of tax is between the federal and state tax—i. e., the "established norm" recognized and accepted by this Court in *Mobil, supra,* at 448. Additionally, the federal credit is an election. A taxpayer may elect to claim the foreign taxes either as a credit or a deduction. If the taxpayer elects the deduction it will obtain the same deduction on its Idaho state income tax return, because the income base under the Idaho Income Tax Act is federal taxable income. See *Idaho Code* § 63-3022.

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No. 80-2015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASARCO INCORPORATED (FORMERLY THE AMERICAN SMELTING AND REFINING COMPANY), *Appellant*,

v.

IDAHO STATE TAX COMMISSION, *Appellee*.

Appeal From The Supreme Court Of Idaho

REPLY BRIEF OF APPELLANT

GEORGE W. BEATTY
(Counsel of Record)
C. RUDOLF PETERSON
WILLIAM L. GOLDMAN
JAMES A. RIEDY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501
Counsel for Appellant

ALEXANDER J. GILLESPIE, JR.
120 Broadway
New York, N.Y. 10271
Of Counsel

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v.

IDAHO STATE TAX COMMISSION, *Appellee*.

Appeal From The Supreme Court Of Idaho

REPLY BRIEF OF APPELLANT[1]

This brief responds to arguments advanced by the Idaho State Tax Commission ("Idaho") in its brief and by the Multistate Tax Commission ("MTC") in its *amicus* brief.

I. TREATMENT OF DIVIDEND INCOME

This Court has twice held that "the linchpin of apportionability in the field of state income taxation is the unitary-business principle." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425, 439 (1980) (hereinafter "*Mobil*"); *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207, 223 (1980). In its brief, Idaho has acknowledged (Id. Br. 29) that the five dividend-paying companies "were not engaged in a

[1] As required by Rule 28.1 of the Rules of this Court, a list of appellant's subsidiaries (other than wholly owned subsidiaries) and affiliates is set forth on page (ii) of appellant's Jurisdictional Statement, and amended by page (i) of the Brief of Appellant.

single unitary business together with ASARCO." Appellant believes that Idaho has thereby conceded its case.

Idaho asserts (Id. Br. 8-9) that "functional integration between the business activities of the payor and the activities of the payee is not a constitutional requirement" for the apportionment of dividends. But Idaho concedes, as it must, that "[i]n *Mobil*, the Court looked to functional integration between Mobil's operations and the business operations of the dividend-paying subsidiaries in order to conclude that there was a connection between the intangible assets held by Mobil which generated the income and Mobil's unitary business." (Id. Br. 15-16)

As framed by *Mobil*, the issue here is whether appellant's dividends constitute apportionable profits "derived from a functionally integrated enterprise" (445 U.S. at 440) or non-apportionable profits derived from "unrelated business activity on the part of its subsidiaries and affiliates" (445 U.S. at 442). Nothing in Idaho's discussion of the facts (Id. Br. 18-21) refutes the showing in appellant's opening brief (pp. 18-25) that the operations of the five dividend-paying companies were "distinct" and "separate" (445 U.S. at 439, 441) from appellant's unitary business operations in the United States. As previously stated, Idaho has conceded (Id. Br. 29) that the five dividend-paying companies "were not engaged in a single unitary business together with Asarco." Under *Mobil*, the dividends are therefore not apportionable.

In an effort to sidestep *Mobil*, Idaho and the MTC both assert (Id. Br. 8-9, 13; MTC Br. 12) that appellant's stock investments are valuable intangible assets of appellant's own business, with the result that dividends paid on those investments are properly taxable in the States where appellant does business. This argument proves too much. If the "[f]inancial power inherent in possession of assets" provided a sufficient basis for apportioning dividends, as Idaho and the MTC

imply (Id. Br. 14 citing *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, 336 (1939); Id. Br. 20, n.10; MTC Br. 12), then *all* income from significant stock investments would be apportionable. See MTC Br. 11-12, n.22. That conclusion is obviously not the holding of this Court in *Mobil*,[2] and, consequently, the argument must be rejected.

The cases cited by Idaho and the MTC with respect to the state tax treatment of intangible assets provide no support for the assertion that the dividend income in issue here may be apportioned simply because appellant's stock investments were valuable, and therefore important, intangible assets. In particular, Idaho and the MTC place considerable reliance on *Adams Express Co.* v. *Ohio State Auditor*, 165 U.S. 194, *reh'g denied*, 166 U.S. 185 (1897), which they cite (Id. Br. 13; MTC Br. 24) for the proposition that income from intangibles may be apportioned wherever the recipient is conducting its business. But the case does not support this broad generalization. In *Adams Express*, this Court considered the constitutionality of an Ohio property tax imposed on the property of telegraph, telephone, and express companies in Ohio. The value of property in Ohio was determined by multiplying the fair market value of the capital stock of the corporation by a fraction, the numerator of which was the amount of tangible property in Ohio, and the denominator of which was the amount of tangible property everywhere. It is important to note, however, that the intangible property apportioned in *Adams Express* consisted of goodwill and franchises of the corporation. It is hard to imagine intangibles more clearly integrated with the underlying business of the corporation. Clearly, there is no parallel between the apportionment of goodwill in that case and the income from

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[2] "We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business." *Mobil*, 445 U.S. at 441-442.

stock investments of the type involved here.[3] Indeed, to the extent that the opinion in *Adams Express* referred to stocks and bonds, the opinion supports *appellant's* position. In this regard, the Court stated (166 U.S. at 222-223):

> It is suggested that the company may have bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, *or invested in any way outside the business of the company* and so as to be subject to purely local taxation, let that fact be disclosed, and then if the state of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a state in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court. (Emphasis supplied.)

Idaho also cites (Id. Br. 13-14) *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), as another instance where the apportionment of intangibles was upheld. In fact, that case involved the imposition of a *federal* excise tax on corporations, and, thus, did not address the apportionment issue presented here. (The Court considered whether the tax satisfied the apportionment requirement of Article I, Section 9, Clause 4 of the Constitution.) Furthermore, the excise tax in issue there, which was

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[3] These comments also apply to *Ford Motor Co. v. Beauchamp, supra*, where the Court upheld a state corporate franchise tax on an amount determined by multiplying the value of the corporation's outstanding capital stock, surplus, and undivided profits by a fraction, the numerator of which was the corporation's gross receipts in Texas and the denominator of which was the corporation's total gross receipts.

based on the net income of corporations, excluded "amounts received by them as dividends upon stock of other corporations." *Flint* v. *Stone Tracy Co., supra*, 220 U.S. at 145. The opinion in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920), similarly provides no support for the position of Idaho here. In that case, Connecticut imposed a franchise tax on corporations doing business in that State. While the tax was measured by the net income from Connecticut as determined by an apportionment formula, the apportionment of intangibles was not expressly addressed.

Finally, Idaho cites five cases (Id. Br. 15) for the proposition "that intangibles used by a business as a necessary or integral part of the business are taxable where the business activity relating to the intangibles occurs." A careful analysis of these cases, however, establishes that they provide no support for the type of income apportionment urged here. All five of the cited cases were concerned with the situs of intangibles for purposes of property or corporate excise or franchise taxes, and (as this Court noted in *Mobil*, 445 U.S. at 444-445) they are inapposite in a case like the present one involving the apportionment of income.[4] Moreover, in those cases where intangibles were

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[4] In all five cases this Court held that the tax situs of the intangibles involved was the State of commercial domicile or personal domicile of the owner of the intangibles. See *First Bank Corp.* v. *Minnesota*, 301 U.S. 234 (1937) (stock is taxable by the State where the shareholder's principal business office is located); *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193 (1936) (bank deposits and accounts receivable are taxable by the State where the corporation's general business office is located); *First Nat. Bank* v. *Maine*, 284 U.S. 312 (1932) (stock held by a decedent is subject to death transfer tax only by the State where the decedent was domiciled); *Beidler* v. *South Carolina Tax Commission*, 282 U.S. 1 (1930) (notes held by a decedent are subject to inheritance tax only by the State where the decedent was domiciled); *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U.S. 204 (1930) (same result). None of these cases involved the apportionment of income, and none supports the assertion of Idaho (Id. Br. 17) and the MTC (MTC Br. 12-13, n.24) that intangibles "have no fixed situs" and can therefore be apportioned to all States where the taxpayer does business.

treated as "integral" parts of the taxpayer's business, the relationships were much closer and more direct than the relationships involved here.[5]

The MTC also relies (MTC Br. 24) on *Harvester Co.* v. *Dept. of Taxation*, 322 U.S. 435 (1944) and *Wisconsin* v. *J.C. Penny Co.*, 311 U.S. 435 (1940). Neither decision provides support for the apportionment urged here. Both cases involved a Wisconsin tax imposed on domestic and foreign corporations doing business within the State. The tax was imposed "[f]or the privilege of declaring and receiving dividends, out of income derived from property located and business transacted" in Wisconsin; it was payable when the corporation paid dividends and was measured by the portion of the dividends paid out of surplus attributable to Wisconsin earnings. See *Wisconsin* v. *J.C. Penny Co.*, *supra*, 311 U.S. at 440, n.1. In the *Penny* case, the

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[5] In *Wheeling Steel Corp.* v. *Fox*, *supra*, the intangibles consisted of bank deposits and accounts receivable arising directly out of the taxpayer's regular business transactions. In *First Bank Corp.* v. *Minnesota*, *supra*, the intangibles consisted of the stock of banking subsidiaries wholly owned and controlled by a bank holding company. The parent holding company conducted an "integrated business" (301 U.S. at 234) by advising its subsidiaries on loans, commercial paper transactions, interest rates, and the purchase and sale of securities, in addition to planning advertising campaigns and supplying advertising material. In the present case, by contrast, the Court below held (J.S. App. A, 22a-23a) that appellant's 53% stock investment in M.I.M. was "acquired and maintained . . . as an integral and necessary part of [appellant's] mining and smelting business" purely and simply because appellant owned "a majority of [the] M.I.M. stock" and was "engaged in virtually the same [line of] business" as M.I.M. Because appellant "operated independently" of M.I.M., did "little if any business" with M.I.M. and "did not exercise its right to control" M.I.M. (*ibid.*), the relationship between appellant and M.I.M. is clearly distinguishable from the parent-subsidiary relationship in *First Bank Corp.* v. *Minnesota*, *supra*. To varying degrees, the same is true of appellant's relationship with the four other dividend-paying companies. See appellant's opening brief, pp. 18-25.

Court upheld the tax as an additional tax on the corporate payor, stating (311 U.S. at 442):

> The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends.

In *Harvester Co.* v. *Dept. of Taxation, supra*, the Court treated the tax as a withholding tax imposed on the nonresident shareholders (rather than the corporate payor), but still upheld the right of Wisconsin to tax the dividends to the extent paid out of Wisconsin earnings. If anything, *Harvester* supports appellant's position here because the dividend tax on the nonresident shareholders was upheld in that case by looking to the "underlying activity" of the *payor* corporation to determine where the dividends were earned. See *Mobil*, 445 U.S. at 440.

In sum, there is no basis in this Court's prior opinions for contesting appellant's interpretations of *Mobil*. To the contrary, the cases seem to anticipate the "functional integration" test of *Mobil*. See, *e.g.*, *First Bank Corp.* v. *Minnesota, supra*, and *National Leather Co.* v. *Massachusetts*, 277 U.S. 413 (1928), in which this Court upheld the right of a State (other than the State of legal domicile) to impose a property or excise tax on a parent corporation's stock holdings in its subsidiaries. In both cases the businesses of the parent and the subsidiaries were closely integrated in a functional sense. In *National Leather*, for example, leather hides purchased by the parent were tanned and sold for its account by two subsidiaries operating in Massachusetts where the parent had its business headquarters. Under these circumstances, this Court held that Massachusetts was entitled to treat the stock of the subsidiaries as assets used by the parent in its Massachusetts business, stating (277 U.S. at 423-424):

> On the contrary, looking to the substance of the transactions and not merely to form, we think that the petitioner,

through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts — to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the state.

II. TREATMENT OF INTEREST AND CAPITAL GAINS

Because the "[i]nterest income and gains [at issue] were earned from the . . . same intangibles" that generated the dividend income, Idaho agrees (Id. Br. 21) that "the same result should obtain." The interest and capital gains should therefore be excluded from the apportionable income base for the same reasons that the dividends are excluded.

III. ADJUSTMENT OF THE APPORTIONMENT FORMULA

In its opening brief, appellant argued in the alternative (pp. 27-48) that if some of the dividends, interest, and capital gains are included in apportionable business income, both the Due Process Clause and the Foreign Commerce Clause will be violated unless a correlative adjustment is made to Idaho's apportionment factors.

1. In response to appellant's due process argument, Idaho argues, in substance, that only the income of appellant is involved, and, therefore, only the property, payroll, and sales of appellant need to be included in the apportionment factors. (Id. Br. 26-27, 34, 38-39).

In *Mobil*, this Court expressly refrained from deciding whether the inclusion of dividends in apportionable income necessitates a correlative adjustment to the apportionment for-

mula. *Mobil*, 445 U.S. at 434, 441, n.15, and 449.[6] However, the clear thrust of the Court's opinion in *Mobil* is that the form of business organization should not affect the scope of a State's taxing power. If appellant had derived income from unincorporated unitary businesses in which it had a joint venture interest, appellant's share of the property, payroll, and sales of those businesses would clearly have been included in the apportionment formula. "Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives." *Mobil*, 445 U.S. at 441. See also 445 U.S at 459-461, Stevens, J., dissenting.

Idaho (Id. Br. 28-32) and the MTC (MTC Br. 17-22) respond to that argument by erroneously equating appellant's proposal to adjust the apportionment formula with the concept of worldwide combined reporting. Idaho and the MTC misconstrue appellant's argument. Under worldwide combined reporting, income earned by affiliated corporations must be included in the shareholder-corporation's apportionable income in computing state taxes whether or not the income of the affiliates has been distributed to the parent corporation. Under that system, the property, payroll, and sales of a unitary subsidiary are combined with the property, payroll, and sales of the parent corporation.[7] Under the Idaho apportionment formula at issue

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[6] Idaho's argument (Id. Br. 26) that no adjustment of the apportionment formula is required as a matter of law because such an adjustment was not made in *Mobil* is without merit. The question whether the apportionment formula had to be changed was not in issue in that case: "Appellant, we reiterate, took this appeal on the assumption that Vermont's apportionment formula was fair." *Mobil*, 445 U.S. at 441, n.15.

[7] The question whether a State can require a corporate taxpayer to report its taxable income on the basis of the worldwide combined reporting system is before this Court in *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co., Illinois Department of Revenue et al., prob. juris. noted,* _____ U.S. _____, No. 81-349. That reporting system is not at issue here.

here, only that income which is actually distributed by the subsidiary to the parent corporation is included in apportionable business income. Under that system, appellant contends that a concomitant percentage of the property, payroll, and sales of the subsidiary must be included in the apportionment factors.[8] Whether the subsidiary's income is taken into account by the parent immediately (under combined reporting) or only as distributed (under the apportionment method involved here), the due process considerations are the same. In either case, the taxing State's share of the reported income will inevitably be overstated if the out-of-state property, payroll, and sales generating the reported income are not included in the apportionment fraction.

Idaho's assertion (Id. Br. 34) that under the apportionment method Idaho's "share [of apportionable income] cannot be zero or less than zero" is plainly misconceived. Idaho wants a system of apportionment under which it can only benefit. But the inherent nature of apportionment is such that if the operations outside the taxing State are less profitable, on a separate accounting basis, than the operations in the State, an apportionment calculation based on the total profits everywhere will *reduce* the amount of income that is attributed to the operations in the State. See, *e.g.*, *Superior Oil Co.* v. *Franchise Tax Bd.*, 60 Cal.2d 406, 386 P.2d 33 (1963).

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[8] As appellant pointed out in its opening brief (p. 36), the amount of property, payroll, and sales of the dividend-paying corporations that is included in the apportionment formula will depend on the percentage of income of the dividend-paying corporations that is distributed as dividends. Since this is a question of first impression, there is no established mechanism to implement the adjustment. That is why appellant initially suggested (p. 36, n.29) a remand on this issue if the Court holds that adjustment is necessary. The problems Idaho raises (Id. Br. 34-35, 38) may be resolved at that point.

Idaho's conclusion (Id. Br. 33-34) that under some factual circumstances it may be better off without apportionment should therefore come as no surprise. For example, if Corporation X operates a division in Idaho that earns $1,000 of taxable income and a second unitary division in Colorado that earns $900 (using the same amount of property, payroll, and sales as the division in Idaho), Idaho will maximize its revenue if Corporation X reports its income using separate accounting concepts. Under the apportionment method, only $950 of the income will be allocated to Idaho. As explained above, the fact that the two divisions are incorporated and operated as separate corporate entities should not change the tax result. Thus, if Idaho requires apportionment, as it has done in the present case, Idaho must bear the risk that its revenue may be "*less* than if dividends are totally excluded from apportionable income." (Id. Br. 34; emphasis in original.)

The example on which Idaho relies (Id. Br. 35-38) was fully refuted in appellant's opening brief (p. 33, n.27). Idaho does not — because it cannot — come to grips with appellant's basic assertion that it is a *per se* violation of the Due Process Clause for a State which uses the three-factor apportionment formula to include income from out-of-state sources in a taxpayer's apportionable income without reflecting in some meaningful fashion the out-of-state property, payroll, and sales which generated that income. For the reasons stated in appellant's opening brief (pp. 31-32), such a procedure necessarily produces a "rate of return" for the taxing State which is greater than the rate of return for the unitary business as a whole. In the present case, Idaho asserts (Id. Br. 23, n.13) that its claimed rate of return on Idaho property is "modest" and "entirely consistent with reasonable expectations." What Idaho fails to acknowledge is that its claimed rate of return greatly exceeds the overall rate of return. For example, in 1969, the total property taken into account by Idaho was $549,581,211 (J.A. 71a). That property

generated total operating income of $30,794,263.[9] Thus, the overall rate of return on the total property taken into account by Idaho was 5.6%.[10] But by including the dividends in apportionable income without increasing the total property account to reflect the out-of-state property generating that income, Idaho claimed a rate of return equal to 15.07% of the Idaho property. (Id. Br. 23, n.13)

As mathematically demonstrated in appellant's opening brief (pp. 33-34 and n.28), formulary apportionment *requires* that the taxing State receive the same rate of return that is earned by the entire business as a whole. Idaho's attempt to increase its rate of return to nearly three times the average rate of return is a clear violation of due process.

It is no defense to say, as Idaho does (Id. Br. 34-35, 38), that adjusting the apportionment formula may involve conceptual and administrative problems. If this Court establishes the basic principle that appropriate adjustment is required, it is certainly not beyond the capacity of the parties and the state courts to apply the principle in various factual contexts.[11]

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[9] Of the total income of $89,823,717 taken into account by Idaho (J.A. 67a), $59,029,454 consisted of investment income derived from property not included by Idaho in the total property account (see J.A. 69a-71a; Appellant's Brief, Appendix B, 5a). The difference of $30,794,263 is the total unitary income generated by the total property taken into account by Idaho.

[10] $30,794,263 ÷ $549,581,211 = .056.

[11] The MTC has not helped matters by presenting examples (MTC Br. 18-22) which contain errors and relate to a factual situation not present here. The combined reporting calculation on the top of page 20 of the MTC brief is erroneous because it includes Corporation B's property, payroll, and sales in the denominators, but not in the numerators, of the apportionment fractions. The example on page 21, and the conclusions drawn from it by the MTC, are incorrect for the same reason. Moreover, all of the MTC's examples are really irrelevant here because all of them involve cases where the taxpayer has received dividends from another corporation doing business in the taxing State. The five dividend-paying corporations involved in this case had no operations or assets of any kind in Idaho. (J.A. 49a; Appellant's Brief 5)

2. Finally, Idaho challenges (Id. Br. 39-46) appellant's assertion that the Foreign Commerce Clause requires that adjustments be made to the apportionment formula to prevent multiple taxation of the same income by foreign governments and the State. [12] In substance, Idaho argues (Id. Br. 41-43) that since no U.S. treaty or federal statute specifically prohibits it from taxing foreign-source dividends, Idaho is free to impose an income tax on those dividends. As explained in appellant's opening brief (pp. 42-45), well-established principles of international law, numerous United States tax treaties, and the Internal Revenue Code all recognize the primary right of the source nation to tax dividend income. [13] A specific statute or treaty prohibiting similar taxation at the local level is not a prerequisite, since it is the Constitution in this instance that places a restriction on Idaho's taxing power. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979) (hereinafter "*Japan Line*"). [14]

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[12] Idaho also questions the scope of appellant's argument on this issue. (Id. Br. 40, n.18) As stated in appellant's opening brief (pp. 39-40), appellant was subject to foreign tax on the dividends it received from M.I.M. and Mexicana, and on the interest it received on a Mexican note issued in connection with a prior sale of Mexicana stock. Appellant's Foreign Commerce Clause argument therefore focuses on these items. The risk of multiple foreign and state taxation also exists with respect to the earnings appellant derived from Peru. However, appellant's Foreign Commerce Clause argument does not apply to the income which appellant received from General Cable and Revere, both of which are domestic corporations operating in the United States (J.A. 135a).

[13] Idaho acknowledges (Id. Br. 44) that the purpose of the federal foreign tax credit provisions is "to avoid duplicative taxation at the *national* level of earnings derived from sources outside of the United States." By that statement, Idaho implicitly acknowledges that double taxation will occur if it taxes foreign-source dividends that are subject to foreign tax.

[14] There was no federal statute or U.S. treaty in *Japan Line* that expressly prohibited local jurisdictions from imposing ad valorem property taxes on the shipping containers, and, thus, *Japan Line* cannot be distinguished on that basis. It is true that Article 2 of the Customs Convention on Containers

Idaho attributes too much significance (Id. Br. 42-43 and n.19) to Congressional inaction. The failure of Congress to act should not be construed as approval of the status quo. See *Japan Line*, 441 U.S. at 454; *United States* v. *Underwriters Assn.*, 322 U.S. 533, 556-561 (1944). For example, the fact that Congress repeatedly failed to approve the Multistate Tax Compact did not prevent this Court from upholding the constitutional validity of the Compact in *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 458 (1978). Similarly, Congressional failure to enact legislation prohibiting state taxation of foreign-source dividend income should not prevent this Court from upholding and applying the *constitutional* restraints on multiple taxation of income from foreign commerce. As the Court stated in *Japan Line* (441 U.S. at 454), the States are not "free to impose demonstrable burdens" on foreign commerce simply because Congress has not "pre-empted the field by affirmative regulation." Thus, if Congress wants to sanction multiple taxation of foreign income by the States, it can do so only by taking affirmative legislative action under its Commerce Clause powers. There are simply too many possible explanations of Congressional inaction to regard it as signifying that a majority of the members of both Houses approve of existing practices. [15]

(20 U.S.T. 301; T.I.A.S. No. 6634) prohibits treaty countries from imposing "import duties and import taxes" (*Japan Line*, 441 U.S. at 446, n.10), but if the Los Angeles property tax at issue in *Japan Line* had constituted an import duty, it would have been struck down under Article I, Section 10, Clause 2 of the Constitution. Thus, contrary to Idaho's argument, the fact that Idaho is not expressly covered by U.S. tax treaties and the fact that no federal statute specifically prohibits the contemplated taxation does not distinguish *Japan Line* from the present case.

[15] Idaho also relies (Id. Br. 42, n.19) on the fact that the Senate failed to ratify the Income Tax Convention between the United Kingdom and the United States, signed on December 31, 1975, until Article 9(4), which prohibited the States from using the "worldwide combination/unitary

Idaho argues (Id. Br. 41; see also MTC Br. 26) that appellant's reliance on *Japan Line* is misplaced because that case is limited to property taxes. This Court in *Japan Line* went to great lengths to point out that in the area of property taxation a theory of apportionment, analogous to income tax apportionment, has developed for instrumentalities of interstate commerce that have a temporary situs in several States. *Japan Line*, 441 U.S. at 441-447. Whether the tax in issue is a property tax or an income tax, approval of the apportionment theories used for those taxes has been premised on this Court's "ability to enforce full apportionment by all potential taxing bodies." *Japan Line*, 441 U.S. at 447. The problem confronted in *Japan Line*, with respect to a property tax, and the problem presented here, with respect to an income tax, is whether a fair apportionment can be obtained when one of the taxing bodies is a foreign nation. "[N]either this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign."

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method of apportioning income" in determining the taxable income of British multinational corporations, was deleted. Idaho argues that the refusal of the Senate to ratify that provision refutes appellant's argument that established policy necessitates adjustment of the apportionment factors. Idaho reads too much into the Senate's action. The Report of the Senate Foreign Relations Committee makes it clear that the Senate objected primarily to the means chosen to implement that policy and not to the policy itself. The Report states (Ex. Rept. 96-5, 96th Cong., 1st Sess. 6 (1979)):

> During last year's debate both in the Foreign Relations Committee and on the Senate floor, opponents of Article 9(4) argued that any prohibition of the right of states to use worldwide combination under the unitary tax system should be addressed legislatively rather than through the treaty process. Even some supporters of Article 9(4), while not questioning the propriety of the Article, indicated their preference for Congressional consideration through the legislative process of the issue.

Indeed, Senator Church's proposal to delete Article 9(4) was defeated in committee and on the floor of the Senate. Ex. Rept. 96-5, 96th Cong., 1st Sess. 2 (1979). That provision was deleted only after the treaty failed to obtain the necessary two-thirds vote for ratification.

Japan Line, 441 U.S. at 447. "Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax . . . may subject foreign commerce 'to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids.' " *Japan Line*, 441 U.S. at 447-448. Because of that threat, the interest of a State in maximizing its revenue must give way to the paramount interest of the United States and to the constitutional right of a taxpayer to be free from burdensome multiple taxation. That is the holding of *Japan Line*. Those considerations have equal force whether the tax concerned is imposed on property or on income. See also the *Amicus Curiae* Memorandum of the United States in *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co., Illinois Department of Revenue et al., prob. juris. noted,* ____ U.S. ____ , No. 81-349.

CONCLUSION

For the foregoing reasons and for the reasons stated in appellant's opening brief, this Court should reverse the decision below and remand the case to the Supreme Court of Idaho for further proceedings.

Respectfully submitted,

GEORGE W. BEATTY
(Counsel of Record)
C. RUDOLF PETERSON
WILLIAM L. GOLDMAN
JAMES A. RIEDY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501
Counsel for Appellant

ALEXANDER J. GILLESPIE, JR.
120 Broadway
New York, N.Y. 10271
Of Counsel

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No. 80-2015

In the Supreme Court of the United States

OCTOBER TERM, 1981

ASARCO INCORPORATED (FORMERLY AMERICAN SMELTING AND REFINING COMPANY),
Appellant,

v.

IDAHO STATE TAX COMMISSION,
Appellee.

On Appeal from the Supreme Court of Idaho

BRIEF OF AMICUS CURIAE STATE OF ILLINOIS IN SUPPORT OF APPELLEE

FRED H. MONTGOMERY
Special Assistant
Attorney General
LLOYD B. FOSTER
Litigation Counsel
Illinois Department
of Revenue
160 North LaSalle Street
Suite 600
Chicago, Illinois 60601
(312) 793-7046
Of Counsel

TYRONE FAHNER
Attorney General of Illinois
160 North LaSalle Street
Suite 900
Chicago, Illinois 60601
Counsel for Amicus Curiae

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ASARCO INCORPORATED (FORMERLY AMERICAN SMELTING AND REFINING COMPANY),
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vs.

IDAHO STATE TAX COMMISSION,
Appellee.

BRIEF OF AMICUS CURIAE STATE OF ILLINOIS IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST

The decision in this case will affect the tax revenues and the burden of taxation in Illinois and every other state which imposes an income tax. Also, it will affect the development toward full and fair apportionment of income among the States. See Corrigan, *Toward Uniformity in Interstate Taxation*, Tax Notes, pp. 507-14 (September 15, 1980). Illinois is not a member of the Multistate Tax Commission, but it has adopted substantially all of the Uniform Division of Income

for Tax Purposes Act (UDITPA) apportionment provisions. Ill. Rev. Stat. (1981) Ch. 120, Article 3. As such, Illinois is concerned that this Court be informed about two essential elements of UDITPA — business income and combined apportionment — and that these two elements withstand constitutional scrutiny.

THE DEFINITION OF "BUSINESS INCOME" GUARANTEES CONFORMITY WITH THE DUE PROCESS CLAUSE

A. *MOBIL* Does Not Prevent A State From Apportioning Income Earned On Stock Investments If It Constitutes "Business Income"

Appellant wants to avoid state taxation on "foreign source" income generated by its investment in certain corporations. It contends that unless two corporations are functionally integrated, all dividend income received by the payee should be attributed to the business activities of the payor.

This ignores the well-established state and federal tax principle that a dividend is taxed as income to the payee, and it is different from profits which are taxed as income to the payor. *In re Goodyear Tire and Rubber Co.*, 133 Vt. 132, 335 A. 2d 310 (1975).

Appellant's argument is also totally at odds with this Court's decisions in cases involving intangible property or the income derived therefrom and apportioned state taxes. *Adams Express Co. v. Ohio State Auditor*, 164 U.S. 194 (1897) rehearing denied 166 U.S. 185; *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939); *Mobil Oil Corp. v. Com'r. of Taxes of Vermont*, 445 U.S. 425 (1980). These cases hold that intangibles or income from intangibles may be appor-

tioned among the jurisdictions in which the taxpayer conducts unitary business activities. See *Curry v. McCanless*, 307 U.S. 357, 367 (1939).

Appellant principally relies on *Mobil Oil, supra*, but it is clear that this reliance is misplaced, and, in accord with prior decisions of this Court, *Mobil* supports the tax imposed by appellee. *Mobil* decided that there is nothing about the character of income earned from investments in corporations operating abroad that precludes state taxation by the apportionment method. Simply because income is received in the form of dividends or because it is received from a "foreign source" does not mean that it can escape an apportioned state income tax. In order to avoid taxation on investment income, a taxpayer must demonstrate that there is no "minimal connection". It must show that the income " . . . was earned in the course of activities unrelated to the [conduct of activities in the taxing State.]", 100 S. Ct. at 1232; that " . . . the business activities of the dividend payor have nothing to do with activities of the recipient in the taxing State,", 100 S. Ct. at 1233-4; or that there was " . . . unrelated business activity on the part of its subsidiaries and affiliates . . . ", 100 S. Ct. at 1234. A taxpayer cannot make this showing where the income in question is "business income". *Infra*, P. 5

Appellant's argument is not framed in terms of "unrelated business activities". It is framed in terms of "functionally integrated" corporations and it confuses the factual findings in *Mobil* with the legal principles enunciated therein. This Court found that *Mobil* together with its subsidiaries and affiliates engaged in or contributed to an integrated petroleum enterprise. 100 S. Ct. at 1230. This finding provided a relationship of business activities which satisfied the Due Process Clause. (The record in this case shows that appellant also operated an integrated enterprise.) However, the integrated enterprise found to exist in *Mobil* was not referred to as the

only situation in which the constitutional standard could be met. The language quoted above makes it clear that a state can apportion dividends if they constitute "business income" as defined in UDITPA.

In addition, one should keep in mind the difference in the statutes involved. Vermont apportions federal taxable income, with minor modifications, so the unitary business principle is a useful context in which to view the Vermont statute and the income earned from Mobil's business activities.[1] UDITPA, on the other hand, determines the contours of a unitary business,[2] it distinguishes between business and nonbusiness income, and then it apportions only business income. *Mobil* did not consider whether the relationship of income to business activity, required under UDITPA's definition of business income, conforms to the requirements of the Due Process Clause. Thus, appellant's contention that *Mobil* prohibits the apportionment of dividends unless the corporations are functionally integrated is unjustified.

All of the States which impose an income tax (or a privilege or franchise tax measured by net income) have chosen to apportion income earned from business activities conducted within and without a State rather than to separately account for income earned within a State. Although appellant seems to recognize the shortcomings of separate accounting, it nonetheless argues that apportionment can only be used if

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[1] This is not to say that the Due Process Clause requires a State to find that a unitary business exists before it can apportion, without modification, all federal taxable income. The issue has not been decided by this Court. See Vt. Stat. Ann., Tit. 32, § 5811 and § 5833(a).

[2] *Caterpillar Tractor Co., et al., v. Lenckos*, 84 Ill. 2d 102, 417 N.E. 2d 1341 (1981) *sub nom. Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., Illinios Department of Revenue, et al.*, prob. juris. noted __ U.S. __, Dk. No. 81-349, Nov. 9, 1981.

it is impossible to separately account for an income-producing activity. It then claims that the income in question can be separated from the income earned by its unitary business activities. However, this analysis places a double burden on the appellee and the other States; first, to adopt a method of fair apportionment and second, to prove that apportionment is necessary to tax each income-producing activity. The second burden defeats the purpose of apportionment[3] and it circumvents the real question — namely, whether the income in question is business income earned by a unitary business which operates in part in the taxing State.

B. "Business Income" Includes Income Earned On Property Which Is Acquired And Managed As An Integral Part Of A Taxpayer's Trade Or Business

Under UDITPA, the definition of business income includes income from "intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations". Ill. Rev. Stat. (1981), Ch. 120. § 15-1501(a)(1); UDITPA § 1(a). Business income is apportioned to the state according to a three-factor formula of property, payroll and sales. Ill. Rev. Stat. (1981), Ch. 120, § 3-304(a); UDITPA § 9. Appellee has enacted similar statutory provisions, and appellant has not challenged them as a matter of constitutional law. In fact, appellant acknowledges that the business income test may be

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[3] Similarly, suppose three lawyers form a partnership and agree to split equally all income and expense. After a year, if one partner claimed he should receive all of the income paid by one client because he alone represented the client, this would defeat the purpose of the partnership agreement.

appropriate in some situations, but it does not suggest any constitutional guidelines. Woolworth's Brief, P. 18-19; ASARCO's Brief, P. 18.

The Court below reviewed the factual record and found that the income in question should be classified as business income. It was earned as a result of investments in subsidiaries which were acquired and managed as integral parts of appellant's business conducted in part in the State. There is substantial evidence in the record to support this finding, and there are no "exceptional circumstances" which require a re-examination of the record on appeal. *Evco v. Jones*, 409 U.S. 91, 95 (1972); *Cal. Retail Liquor Dealers Ass'n. v. Midcal Alum.* 100 S. Ct. 937, 946-7 (1980); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). Moreover, appellant has not challenged the application of UDITPA to the facts of its case.

The "business income" test has several characteristics. It is not the same as combined apportionment; it applies to all types of income, not just dividends; and it more than meets the due process requirement that the income be related, or minimally connected, to the business activities conducted in part in the taxing State.

Combined apportionment determines the contours or the members of a unitary business. Business income is the apportionable income earned by a trade or business. Combined apportionment is used if two or more corporations are related through common ownership and their activities are integrated with, contribute to or dependent upon each other. Business income is apportioned if the property generating the income is acquired and managed as an integral part of a corporation's trade or business. If a corporation is a member of a combined group, its business income is combined with the business income of the other members of the group, all of which is included in the combined apportionment formula. Since these are two distinct tax concepts, one should not com-

pare the results of each in an attempt to determine what is a correct or fair tax. *Infra*, p. 10. Each concept should be judged on its own merits and on the fact situation in which it is applied.

Business income, by definition, identifies the amount, and only that amount, of apportionable income a taxpayer earns in the conduct of its trade or business. It is a test of general applicability. Functional integration, on the other hand, is a test of limited applicability. It applies only to income earned on stock investments, including dividends, interest and capital gains. For instance, compare the applicability of the business income test and the functional integration test to the following situations: interest earned on working capital deposited in a bank; interest earned on loans to affiliates, see *Qualls v. Montgomery Ward Co., Inc.*, 585 S.W. 2d 18 (1979); dividends paid by an affiliated supplier like ARAMCO pays to Mobil; capital gains earned on the activity of buying and selling companies, see *Atlantic Richfield Co. v. State of Colorado*, 601 P.2d 628 (1979); income from providing management or technical services; patent and royalty income; and sales to customers. Determining what is business income in these situations will more than establish whether the income was earned in an activity related, or minimally connected, to the taxpayer's business. Deciding whether the payor and payee are functionally integrated is not determinative of whether a state may constitutionally tax these types of income. If functional integration is adopted as the exclusive test for determining apportionable income earned on stock investments, a different due process test will have to be used for the types of income outlined above. But *Mobil* expressly decided that there was nothing about the nature of dividend income which distinguished it, in a due process sense, from the other income which a state may tax.

One requirement of the Due Process Clause identified in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), is that there be a "minimal connection" between the interstate activities and the taxing State. *Mobil* stated that income earned by activities unrelated to the taxpayer's business may escape an apportioned tax. Income earned from property which was acquired and managed as an integral part of a taxpayer's business certainly falls within this constitutional framework.

THE FACTORS IN THE APPORTIONMENT FORMULA DO NOT NEED TO BE ADJUSTED

A. Appellant Has Not Shown By Clear And Convincing Evidence That Extraterritorial Values Are Being Taxed

Appellant contends that under *Mobil* if appellee apportions dividends, it must include some percentage of the property, payroll and sales of the payor in the payee's apportionment formula.[4] It argues that if this adjustment is not made, the formula will be "inherently arbitrary" and it will necessarily overstate the income properly attributable to the State. Appellant claims to have met its burden of proving that extraterritorial values are being taxed by claiming that the appellee's method results in a higher tax liability and by using a hypothetical example to show that receiving dividends from a sub-

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[4] This assumes that the dividends represent income earned by the payor and that the apportionment formula must reflect the factors which generate the income. This proposed adjustment is a hybrid of combined apportionment. It is impossible to reconcile this position with appellant's statement that it agrees with the position against combination taken by the appellant in *Chicago Bridge & Iron Co., supra*. See ASARCO Brief, p. 31; Woolworth Brief, p. 37. In effect, appellant is asking this Court to authorize an adjustment which it thinks is unconstitutional.

sidiary will result in a higher tax than receiving income from a division.

At the outset, one should remember that the income being taxed was earned from the activity of acquiring and managing intangible property which is integral to the taxpayer's business conducted in part in the taxing State. The three factor formula already reflects the property, payroll, sales and expense attributable to this activity. The sales factor includes the dividends received. The payroll factor includes the salaries of the employees and officers who make and manage the investments. The property factor includes the office space and equipment necessary for conducting this activity. Appellant's business income has been reduced by the expenses of acquiring, managing and disposing of its investments, e.g. salaries, office supplies and equipment, travel, communication, and interest on indebtedness that otherwise would not have been incurred but for the stock investment. If the income in question really is nonbusiness income, all of these items should be excluded from the apportionment formula. Appellant has not offered to do this, undoubtedly because it would be impossible to separate these items from its other business activities.

A taxpayer who attacks an apportionment formula must show by clear and cogent evidence that it results in taxing extraterritorial values. *Butler Bros. v. McColgan*, 315 U.S. 501 (1942). Appellant claims to have met this burden by noting that the formula will cause the percentage of its tax liability (not amount) to increase significantly and by using a hypothetical example to show that receiving dividends from a subsidiary will result in a higher tax than receiving income from a division. These two pieces of evidence are neither clear nor convincing. The fact that there is a difference between what the parties think the tax should be does not prove or disprove which party is correct. The hypothetical example

used by appellant is faulty, as will be shown, for several reasons: the taxation of dividends and the use of combined apportionment are not comparable; the amount of dividends paid each year are not related to the property, payroll and sales of the payor; and other examples can be used to show the tax avoidance and illogical consequences caused by the proposed adjustments.

First, as was mentioned earlier, the taxation of dividends and the use of combined apportionment are separate and distinct tax concepts. The former depends upon the relationship between the purpose of the investment and the business activity of the taxpayer; the latter depends upon common ownership and the extent of integration, contribution and dependency among the corporations. The former apportions dividends received by the payee; the latter apportions the income of the payor and the other members of the combined group. Contrary to appellant's interpretation, *Mobil* did not equate the two concepts. *Mobil* did say that the propriety of apportionment depends upon the underlying economic reality among corporations rather than divisional or corporate lines. This was in the context of finding that Mobil's investment activities were not separate from its other business activities. It was not in the context of requiring states to adjust their apportionment formulas in order to reach results similar to combined apportionment. In fact, *Mobil* expressly did not decide whether the apportionment formula should be adjusted or whether combined apportionment is required.[5] Also, *Mobil* allowed dividends from affiliates to be apportioned and affiliates are not usually considered to be part of the

[5] It is noteworthy that the use of combined apportionment is authorized in appellee's State. If the relationship between the parent and subsidiary had warranted it, appellant could have obtained the adjustment it now requests by using the combined report.

combined group. This means that, as a matter of law, appellant is not entitled to an adjustment in the formula whenever investment income is apportioned.

Second, the hypothetical example and the proposed adjustment are misconceived because they presume that the dividends, like net income, are related to the property, payroll and sales of the payor. They are not because the amount of dividends paid by a corporation is usually less, but may be more, than current net income. The net income available for dividends is first reduced by federal, state and foreign taxes and reserves for expansion. Also, accumulated earnings and profits limit the amount of taxable dividends which may be distributed. See I.R.C. § 312; BNA Tax Management Portfolios, *Earnings and Profits,* 175-2nd. In theory, if the income of the payor includes dividends received from its subsidiaries, then the earnings and profits of these second-tier corporations would also affect any factor adjustment. Appellant's reason for adjusting the apportionment formula is that the factors should reflect the "source" of the dividend income. While property, payroll and sales reasonably reflect the income-producing activities of the payor, they do not reasonably reflect the dividends paid since they are not related to the net income and the earnings and profits otherwise available for distribution. Thus, appellant has not proposed a conceptually sound adjustment.[6]

Different hypothetical examples can be used to show that appellant's proposed adjustment can be used to avoid taxes and that it causes illogical consequences. The Idaho State Tax Commission's brief demonstrates how the proposed ad-

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[6] Appellant has not suggested how the formula should be adjusted for interest and capital gains. This reflects a severe deficiency in the rationale for why an adjustment is needed in the first place.

justment can exempt dividends or even reduce otherwise taxable income, depending on the size of the payor's three factors relative to the payee's three factors. That brief also illustrates how the proposed adjustments could attribute part of a taxpayer's income to jurisdictions in which it conducts no business activities and in which it could not be taxed. The Brief of *Amicus Curiae* Multistate Tax Commission provides examples which show that there is no equivalence in tax between the use of a combined report and the inclusion of the payor's factors in the payee's denominators.

B. A State Tax On Domestically-Earned Income Derived From Domestically-Owned Property Which Is Related To Both Domestic And Foreign Business Activities Does Not Invoke The Foreign Commerce Clause

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S. Ct. 1813 (1979), involved cargo containers that were "owned, based and registered abroad and that [were] used exclusively in international commerce," 99 S. Ct. at 1819. In an effort to address this narrow question, this Court declined to revive the "home port doctrine," and it did not reach the questions as to the taxability of foreign-owned instrumentalities engaged in interstate commerce or of domestically-owned instrumentalities engaged in foreign commerce. *ibid*

The instant case involves income earned and property owned by a domestic corporation which conducts both interstate and foreign activities. The property is intangible, and it is an integral part of appellant's business. Since appellant conducts business in other jurisdictions as well as the taxing State, the intangible property does not have a fixed situs, nor is the income treated as having a single source.

Japan Line involved foreign-owned tangible property which was used exclusively in international commerce. This case involves domestically-earned income derived from domestically-owned intangible property which is an integral part of a business with both interstate and foreign activities. Appellant has not demonstrated that the State tax is imposed on foreign commerce, and this is a prerequisite to any argument premised on the two precepts enunciated in *Japan Line*.

Japan Line found that a local tax was prohibited where actual multiple taxation was established and where a treaty between the United States and Japan expressly prohibited the tax in question. This Court should find that the tax is permitted, not only because it is not imposed on foreign commerce, but because there is no evidence of multiple taxation in fact and there is no federal statute or treaty which prohibits the state tax. In addition, appellant has not shown that the tax is discriminatory. The State tax reaches all dividends included in both federal taxable income and business income regardless of whether they are paid by domestic or foreign corporations. The fact that part or all of some dividends are deducted in computing federal taxable income whereas other dividends are adjusted by way of a federal tax credit is a matter of federal law and elections made by a taxpayer. See I.R.C. §§ 78, 243-246, 901-908, 951-964. The State statute does not subject foreign commerce to a different burden of taxation than domestic commerce. Also appellant has not shown that the State tax is "inimical to the national commerce" such that this Court should act where Congress has not acted. In fact, if this Court adopted appellant's argument, it would infer a constitutional preference for allocation of dividend income to a foreign situs rather than apportionment among the States. This is what the Court refused to do in *Mobil*.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* State of Illinois respectfully request this Court to affirm the decision of the Court below.

Respectfully submitted,

TYRONE FAHNER
Attorney General of Illinois
160 North LaSalle Street
Suite 900
Chicago, Illinois 60601

Fred H. Montgomery
Special Assistant Attorney General
Lloyd B. Foster
Litigation Counsel
Illinois Department of Revenue
160 North LaSalle Street
Suite 600
Chicago, Illinois 60601
(312) 793-7046

Of Counsel

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No. 80-2015

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1980

ASARCO INCORPORATED (formerly AMERICAN SMELTING AND REFINING COMPANY),

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES

WILLIAM D. DEXTER,
General Counsel,
MULTISTATE TAX COMMISSION,
204 Custer Way
Tumwater, WA 98501
(206) 357-8000

Counsel for Amicus Curiae.

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

PARTICIPATING AMICUS CURIAE

State of Alabama
RALPH E. EAGERTON, JR.
Commissioner of Revenue
Alabama Department of Revenue
201 Administrative Bldg.
Montgomery, AL 36130

State of Alaska
WILSON L. CONDON
Attorney General
Department of Law
Pouch K
State Capitol
Juneau, AK 99811

State of Arkansas
FARRIS W. WOMACK
Director, Arkansas Department of Finance and Administration
3278 Littlerock, AR 72203

State of Colorado
J. D. MACFARLANE
Attorney General
1525 Sherman
Denver, CO 80203

State of Connecticut
CARL R. AJELLO
Attorney General
30 Trinity Street
Hartford, CT 06115

State of Delaware
RICHARD S. GEBELEIN
Attorney General
Department of Justice
State Office Bldg.
Wilmington, Dela 19801

District of Columbia
CAROLYN SMITH
Director of Finance & Revenue
Room 4136, Municipal Center
300 Indiana Avenue N.W.
Washington, DC 20001

State of Florida
RANDY MILLER
Executive Director
Department of Revenue
102 Carlton Bldg.
Tallahassee, FL 32301

State of Hawaii
GEORGE FREITAS
Director of Taxation
425 Queen Street
Honolulu, HI 96813

State of Idaho
DAVID H. LEROY
Attorney General
THEODORE V. SPANGLER, JR.
Deputy Attorney General
Office of the Attorney General
State House
Boise, ID 83720

State of Indiana
LINLEY E. PEARSON
Attorney General
219 State House
Indianapolis, IN 46204

State of Kansas
ROBERT T. STEPHAN
Attorney General
Kansas Judicial Center, Second Floor
Topeka, KS 66612

State of Maryland
STEPHEN H. SACHS
Attorney General
One South Calvert Building
Baltimore, MD 21202

State of Massachusetts
FRANCIS X. BELLOTTI
Attorney General
1 Ashburton Place
Boston, MA 12108

State of Michigan
FRANK K. KELLY
Attorney General
Law Building
Lansing, MI 48913

State of Minnesota
WARREN R. SPANNAUS
Attorney General
102 State Capitol
St. Paul, MN 55145

(Continued on Back Page)

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Uniform Division of Income for Tax Purposes Act (UDITPA) contravenes either the due process or commerce clause of the Constitution of the United States to the extent it requires the inclusion of income from stock investments in apportionable income when these investments are acquired and managed by the taxpayer in connection with its multistate trade or business operations.

2. Whether the apportionment provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA), without modification, contravenes either the due process or commerce clause of the United States Constitution in requiring the apportionment of all business income under the UDITPA three-factor (tangible property, payroll and sales) apportionment formula when business income includes income from investments in stock and when the taxpayer has offered no proof that the formula attributes any net income to the taxing state which is not reasonably related to its instate activities and properties, as required by section 18 of UDITPA.[1]

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[1]Idaho Code (hereinafter called I.C.) § 63-3027(r); 7A Uniform Laws Annotated 106 (1978).

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Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 Vand. L. Rev. 401 (1976) 10

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IDAHO STATE TAX COMMISSION,

Appellee.

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BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES

INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission (hereinafter called the Commission) and participating states in support of the Appellee. Both parties to this proceeding have consented to the filing of this brief.[2]

STATEMENT OF INTEREST

The Commission is the administrative agency of the

[2]Originals of the consent letters have been filed with the Clerk of the Court.

Multistate Tax Compact[3] (hereinafter called the Compact) entered into currently by 19 states (including Idaho) and the District of Columbia as full members, and by 11 states as associate members.[4]

Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (hereinafter called UDITPA).[5] The purpose of UDITPA is to provide for the uniform allocation and apportionment of income for state income tax purposes by those states that have adopted it.[6] It has been adopted by a great majority of the income tax states. UDITPA apportions "business income" in accordance with the well-recognized three-factor apportionment formula of tangible property, payroll and sales (receipts) and specifically allocates "non-business" income, as provided for therein.

Pursuant to its authority under Article VII of the Compact, the Commission has promulgated regulations which implement UDITPA.[7] Approximately 18 states have adopted these regulations substantially in the form as adopted by the Commission.[8]

It is important that UDITPA be interpreted to carry out its purpose to provide for uniformity and full accountability (without duplication) in the division of income for

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[3]For an analysis of its provisions and their operative effect, *see U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), affirming 417 F. Supp. 795 (S.D.N.Y. 1976). The purposes of the Compact are to: (1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) Promote uniformity or compatability in significant components of tax systems; (3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and; (4) Avoid duplicate taxation.

[4]14 Multistate Tax Comm'n Ann. Rep. 10-13 (1980-1981).

[5]UDITPA was promulgated in 1957 by the National Conference of Commissioners on Uniform State Laws. *See* 7A Uniform Laws Annotated 91 (1978).

[6]*See* Prefatory Note to UDITPA, 7A Uniform Laws Annotated 91-92 (1978).

[7]7 Multistate Tax Comm'n Ann. Rep. 64-84 (1973-1974).

[8]Department of Revenue, State of Indiana, *Results Of A Survey On The Uniformity of State Laws* 4 (1977).

state income tax purposes by workable and rational division of income rules.[9]

The Commission and the states joining in this brief are concerned with ASARCO's position that, under the due process and commerce clauses of the United States Constitution,[10] income from stock (and presumably other income from intangible property), acquired and held in connection with a taxpayer's unitary business, cannot be apportioned, for state income tax purposes, among the various taxing jurisdictions where the taxpayer conducts its unitary business, as required by a reasonable interpretation and application of UDITPA.

More particularly, the Commission and its member states are concerned with ASARCO's novel argument that only the income from investments in the stock of payors, which conduct a unitary business with a payee taxpayer is apportionable, and that, if apportionable, this income must be attributed to the business activities of the payor corporations by modification of the UDITPA apportionment formula. The acceptance of this argument would require this Court to declare the apportionment provisions of UDITPA unconstitutional even though UDITPA requires only reasonable apportionment of the unitary income of a unitary business. The purpose of this brief is to demonstrate that UDITPA, as interpreted and applied by the court below, is constitutional.

COUNTER STATEMENT OF THE CASE

The Commission accepts ASARCO's Statement and Idaho's Counter Statement of The Case except that it *disagrees* with ASARCO's statements pertaining to its relationship with the dividend payor corporations and with its omission of the following important facts: The Idaho Supreme Court found that ASARCO's dividends, capital gains and interest derived from stock investments which

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[9] *See GTE Automatic Elec. v. Allphin*, 68 Ill.2d 326, 369 N.E.2d 841 (1977); Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 Taxes 747, 748-49 (1957).

ASARCO actively acquired, managed and disposed of, constituted "an integral and necessary part of its mining and smelting business," which was carried on in part in Idaho for the years in question. J.S. at 22a. There is nothing in the record to establish otherwise and ASARCO does not contest this finding. Neither is there anything in the record except ASARCO's irrelevant "separate accounting" argument, J.S. at 30a, to establish that the UDITPA apportionment formula, as applied to ASARCO's total business income, assigned any income to Idaho not reasonably related to ASARCO's conduct of its unitary business in Idaho for the years in question. Thus, the Idaho Supreme Court found that ASARCO had not shown that the UDITPA formula attributed any of ASARCO's extra-territorial values or income to Idaho.

Based on these facts and findings, the Idaho Supreme Court upheld the apportionability of the income in question as "business income," as defined in UDITPA § 1(a),[11] without modification of the UDITPA apportionment formula.[12]

SUMMARY OF ARGUMENT

UDITPA, as interpreted and applied by the Court below is constitutional. This Court has consistently held that the apportionment of the entire net income of a unitary business for state income tax purposes is constitutional in the absence of a showing by clear and cogent evidence that a particular formula results in the taxation of extra-territorial values. *Exxon Corp. v. Department of Revenue*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931); *Bass, Ratcliff & Gretton Ltd. v. State Tax*

[11] I.C. § 63-3027(a)(1); 7A Uniform Laws Annotated 93 (1978).

[12] The Idaho Tax Commission did include the income from stock and other intangibles in the denominator of the sales factor. *See* J.A. at 73a.

Comm'n, 266 U.S. 271 at 282 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920). Furthermore, this Court has applied no different standards where apportionable income or value includes substantial income from or value of stock investments in foreign corporations so long as these investments are related to the unitary business. *Mobil, supra*; *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, *rehearing*, 166 U.S. 185 (1897). Also, this income or value is properly attributable to where the business is conducted as reflected by tangible apportionment factors, such as tangible property (*Adams Express, supra*; *Underwood, supra*; *Bass, supra*), sales (*Beauchamp, supra*), or the three factor formula (*Butler Bros., supra*; *Cleveland Cliffs Iron Co. v. Department of Revenue*, 329 Mich. 225, 45 N.W. 2d 46 (1950)). This simply recognizes that intangibles by their very nature have no fixed geographical situs (*Mobil, supra*; *Curry v. McCannless*, 307 U.S. 357 (1939)); that an apportionment formula does not purport to situs income or property (*Moorman, supra*); and that the most reasonable way to assign intangible values, without duplication, is by the apportionment method (*Mobil, supra*; *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952)).

In conformity to the above constitutional standards, the court below properly upheld the apportionability of the income from the stock investments in question, along with all other income connected with the taxpayer's unitary business, by the general three-factor UDITPA apportionment formula.

ASARCO's argument that the lower court erred in its opinion is based on many fallacious factual assumptions and an erroneous interpretation and application of *Mobil, supra* and *Japan Line Ltd. v. Los Angeles*, 441 U.S. 434 (1979). It bases its entire argument on the erroneous assumption that dividends must be attributable to the activities of the payors, for apportionment purposes, which conflicts with *Mobil, supra*, and numerous other decisions of this Court.

ARGUMENT

I. The UDITPA Apportionment Provisions are Constitutional Because These Apportionment Provisions (1) Only Require that Income Related to the Taxpayer's Unitary Business Be Included in Apportionable Income; (2) Apportion This Income by the Well Recognized Three-Factor Apportionment Formula; and (3) Provide for Relief if the Apportioned Income is Not Reasonably Related to the Taxpayer's Instate Business Activities

This case involves the sole question of the constitutionality of the apportionment provisions of UDITPA.[13] Without question, the Idaho Supreme Court reasonably interpreted and applied these apportionment provisions, which merely require the apportionment of business income[14] of a taxpayer to where the business is conducted as reflected by the location of tangible property, payroll and receipts of the business. UDITPA does not classify income into categories for apportionment purposes, such as income from stocks, bonds, notes, dividends, interest, patents, copyrights, royalties, goodwill, business operations, etc. UDITPA, by its express language and as implemented by the Commission's regulations includes in apportionable income all income from property (including intangibles) and activities which are connected with taxpayer's business which it conducts in part in the taxing state.[15] UDITPA does not attribute business income by

[13]I.C. §§ 63-3027(i) to 3027(r); Art. IV of the Compact; UDITPA §§ 9-18 at 71 Uniform Laws Annotated 100-106 (1978).

[14]UDITPA § 1(a) defines business income as:

> income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. (I.C. § 63-3027(a)(1)).

[15]The Commission regulations, adopted by numerous states, includes rental income, gains from the disposition of assets, interest dividends and income from patents and copyright royalties in apportionable business income where the purpose for acquiring or holding the property is related to or incidental to the taxpayer's trade or business operations. (7 Multistate Tax Comm'n Ann. Rep. app. J. at 64-65 (1973-1974)).

"source" rules but, rather by the unitary business principle.[16] Thus, only the income which the taxpayer derives from its unitary business is subject to apportionment, irrespective of its source or classification.[17]

If the UDITPA apportionment formula does not fairly represent the extent of the taxpayer's business activities within the taxing state, the taxpayer may petition for, or the administrator may require, any other income attribution method to effectuate an equitable distribution of the taxpayer's apportionable business income.[18]

The party seeking to invoke these formula adjustment provisions must show that the UDITPA apportionment formula does not reasonably attribute business income to activities of the taxpayer within the state.[19]

This brief will demonstrate why UDITPA, both on its face and as applied by the court below, is constitutional.

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[16]*See Qualls v. Montgomery Ward & Co.*, 266 Ark. 207, 585 S.W.2d 18 (1979); *Times Mirror Co. v. Franchise Tax Bd*, 102 Cal. App. 3d 872, 162 Cal. Rptr. 630 (1980); *Lone Star Steel Co. v. Dolan*, No. 79CA0506 (Colo. App. Sept. 24, 1981), *cert docketed*, No. 81 SC 382 (Colo. Sup. Ct. Dec. 4, 1981); *Corning Glass Works v. Department of Revenue*, 616 S.W.2d 789 (Ky. App. 1981); *Ruby Construction Co., Inc. v. Department of Revenue*, 578 S.W.2d 248 (Ky. App. 1979); *Albany International Corp. v. Halperin*, 388 A.2d 902 (Me. 1978); *Montana Dep't of Revenue v. American Smelting & Ref. Co.*, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed*, 434 U.S. 1042 (1978); *Champion Int'l Corp. v. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 300 (1975); *Tipperary Corporation v. New Mexico Bureau of Revenue*, 93 N.M. 22, 595 P.2d 1212 (Ct. App. 1979), *cert denied*, 92 N.M. 675, 593 P.2d 1078 (1979); *Sperry & Hutchinson Co. v. Department of Revenue*, 270 Or. 329, 527 P.2d 729 (1974); *Deseret Pharmaceutical Co., Inc. v. State Tax Comm'n*, 579 P.2d 1322 (Utah 1978); *Western Contracting Corp. v. State Tax Comm'n*, 18 Utah 2d 23, 414 P.2d 579 (1966).

[17]*See, e.g.*, cases cited in footnote 16, *supra*; Dexter, *The Business Versus Nonbusiness Distinction Under the Uniform Division of Income for Tax Purposes Act*, 10 Urb. Law. 243 (1978); Dexter, *The Unitary Concept in State Income Taxation of Multistate-Multinational Businesses*, 10 Urb. Law. 181 (1978).

[18]UDITPA § 18; I.C. § 63-3027(r).

[19]*Amoco Prod. Co. v. Armold*, 213 Kan. 453, 518 P.2d 453 (1974); *Donald M. Drake Co. v. Department of Revenue*, 263 Or. 26, 500 P.2d 1041 (1972); *Western Contracting Corp. v. State Tax Comm'n*, 18 Utah 2d 23, 414 P.2d 579 (1966).

II. UDITPA, as Interpreted and Applied by the Court Below, Conforms to Due Process Standards Inasmuch As (1) the Stock Investments in Question and the Income Derived from These Investments Were Rationally Related to ASARCO's Unitary Business Which It Conducted in Part in Idaho; and (2) There is No Showing that the Inclusion of the Income from These Stock Investments in Apportionable Income Resulted in the Taxation of Any Extra-territorial Values or Income.

This Court, has defined the due process limits on the apportionability of net income for state income tax purposes in the following cases: *Underwood Typewriter Co. v. Chamberlain, supra*; *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, supra*; *Butler Bros. v. McColgan, supra*; *Northwestern States Portland Cement Co. v. Minnesota, supra*; *Moorman Mfg. Co. v. Bair, supra*; *Mobil Oil Corp. v. Commissioner of Taxes, supra*; *Exxon Corp. v. Department of Revenue, supra.*

Without exception, these cases hold that a state income tax conforms to the due process clause if a taxable "nexus" exists between the tax and the activity and the state net income tax is rationally related to instate activities and sources. In the case of a unitary business conducted only in part in the taxing state, a net income tax is so related if the income from the business is reasonably apportioned. Further, courts presume that income is reasonably apportioned unless the taxpayer carries the burden of proof by clear and cogent evidence that the taxing state's apportionment computation attributes out-of-state values (income) to the taxing state.

Underwood Typewriter Co. v. Chamberlain, supra, upheld the apportionment of the entire net income by a single-factor formula (tangible property) since the record did not establish that the method of apportionment was "inherently arbitrary" or "produced an unreasonable result." 254 U.S. at 121. *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, supra,* held likewise. 266 U.S. at 283. In *Butler Bros. v. McColgan, supra,* the Court upheld the

apportionment of the entire net income of the taxpayer by the three-factor formula of tangible property, payroll and sales inasmuch as the taxpayer had not established that "it results in extra-territorial values being taxed," 315 U.S. at 507, or "that income unconnected with the unitary business has been used in the formula," *Id.* at 509. *Northwestern States, supra,* upheld apportionment of the entire net income of the taxpayer against a due process challenge because the apportioned income was related to the instate activities of the taxpayer. 358 U.S. at 464. In upholding Iowa's single factor (sales) apportionment formula, the Court in *Moorman Mfg. Co., supra,* recited two due process restrictions, namely "nexus" and a rational relationship between the income attributed to the taxing state and the apportionment formula values connected with the taxing state. 437 U.S. at 273.

Relying on cases like *Underwood, supra, Butler Bros., supra, Bass, supra,* this Court reaffirmed the foregoing general principles in *Mobil,* 445 U.S. at 436-37, and *Exxon,* 447 U.S. at 219-20. The unequivocal holding of these cases, including *Mobil,* is that due process is satisfied if state income taxes are imposed on net income arising in connection with a taxpayer's unitary business a part of which is conducted in the taxing state. Further, they are so related in the case of a multi-jurisdictional business if: (1) the state employs an apportionment formula which apportions the net income which the taxpayer derives from its unitary business operations; and (2) the taxpayer has not established by clear and cogent evidence that the formula attributes extra-territorial values or income to the taxing state. Due process requires no more. Nevertheless, on authority of *Mobil, supra,* ASARCO contends that the inclusion of income from investments in stocks in apportionable income raises additional due process issues. We will next address this contention.

III. Mobil Did Not Limit the Apportionability of Dividends to Dividends Received by a Payee Corporation from Payor Corporations Which Conducted a Unitary Business with the Payee Corporation:

Mobil Supports the Apportionability of All Income Related to or Held in Connection with the Taxpayer's Unitary Business.[19]

Consistent with the above authorities, *Mobil* held that due process apportionability limitations are satisfied if dividends derive from stocks related to the taxpayer's own unitary business conducted in part in the taxing state. The issue in *Mobil* was limited to the question of,

> whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method. 445 U.S. at 435.[20]

The Court discerned only two factors which Mobil contended would differentiate dividend income from operating income, namely, the alleged "foreign source" of the income and the fact that the income was dividend income. 445 U.S. at 438.The Court equated Mobil's "foreign source" due process argument with an effort by Mobil to "separately account" for dividends by ascribing to them a geographical "source" for apportionment purposes. The Court rejected this argument on authority of *Butler Bros. v. McColgan, supra*; *Ford Motor Co. v. Beauchamp,*[21] *supra*; *Moorman Mfg. Co. v. Bair, supra*; *Bass, Ratcliff &*

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[19]For a comprehensive analysis of *Mobil, supra,* see Dexter, *Tax Apportionment of the Income of a Unitary Business: An Examination of Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 1981 B.Y.U.L. Rev. 107 (1981) and the *amicus curiae* brief of the Multistate Tax Commission in the proceedings before the Idaho Supreme Court in this cause on remand from this Court. For an analysis of the alternatives available for the attribution of net income from intangible properties, see Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations,* 29 Vand. L. Rev. 401 (1976), cited in *Mobil,* 445 U.S. at 439 n.14 and his amicus brief in *Mobil.*

[20]Since the Court found that Mobil did not question the accuracy or fairness of Vermont's apportionment formula, but rather elected to attack the tax base, *Mobil* did not consider, "whether application of Vermont's formula produced a fair attribution of appellant's dividend income to that state." 445 U.S. at 434.

[21]*Ford Motor Co. v. Beauchamp, supra,* held that a proportionate value of Ford Motor Company, far in excess of the value of tangible

Gretton, Ltd. v. State Tax Commission, supra, "so long as the intrastate and extrastate activities formed part of a single unitary business." (*Id.* at 438).

In disposing of the "form of dividends" argument, the *Mobil* Court did not differentiate dividends, for due process purposes, from any other class of income. It clearly did not limit the apportionability of dividends to situations in which the payor corporations and the payee corporation are engaged in a single unitary business. *Mobil* upheld the apportionment of Mobil's dividends from ARAMCO in which corporation it owned only a 10% stock interest. Because this limited ownership is less than 50%, it precludes a finding that Mobil conducted a unitary business with ARAMCO. Inasmuch as Mobil's investment in ARAMCO stock assured Mobil of a supply of crude oil in its petroleum business, ARAMCO dividends were clearly apportionable for due process purposes because Mobil's ARAMCO stock investment was related to Mobil's petroleum business, which it conducted in part in Vermont. (In the case at bar, the court below found that the activities of the dividend payor corporations were definitely related to ASARCO's activities in Idaho. J.S. at 22a-23a).

Obviously, apart from the unitary ties between the business of a payee corporation and that of payor corporations, a relationship can exist between stock investments and the business of the payee corporation which is sufficient to justify the apportionment of income from intangibles. *The key question as to the apportionability of income under UDITPA is: Whether the income is derived from investments made in connection with the taxpayer's unitary trade or business?*[22] As *Mobil*

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properties located in Texas, could be attributable to Texas for net worth franchise tax purposes because "In a unitary enterprise, property outside the state necessarily affects the worth of the privileges within the state." (*Id.* at 336). See references to *Butler Bros.* and *Moorman,* at 4, 8, 9, 11, *supra. Cf. Flint v. Stone Tracy Co.,* 220 U.S. 107, 166 (1911).

[22]To construe the due process clause to require that a particular class or source of net income must be specifically related to the taxpayer's unitary business operations, as provided for in UDITPA,

indicates, the relationship of the business of the payor to the business of the payee taxpayer can be relevant in determining whether the income from stock investments should be included in apportionable income. However, the business relationship between the payor and payee is not controlling. A taxpayer might make a stock investment for many related purposes, such as to obtain a market for its product or to establish a source of supply. Such considerations are relevant, however, only to determine if an investment is related to the unitary business of the taxpayer.[23] Other considerations, such as the relationship of intangibles to the overall business, are equally important. *See Ford Motor Co. v. Beauchamp, supra*; *Flint v. Stone Tracy Co., supra.*

In sum, *Mobil* supports the proposition that all "net income" received from stock and other investments held in connection with or for a purpose related to the payee's unitary business operations is subject to apportionment.[24]

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before it can be apportioned, may be too restrictive so long as the apportionment result is reasonable. The reason this may be so is that, without such a specific tie-in, the apportionment of the entire net income of a corporation to the state still may be a reasonable measure of the corporate privileges and activities within the state. For example, if State A imposes a corporate privilege tax measured by apportioned federal taxable income, is due process satisfied if that measure is not shown to unreasonably measure instate corporate presence and activities? *See, e.g., In re Goodyear Tire & Rubber Company, Corporate Income Tax 1966, 1967, 1968,* 335 A.2d 310 (Vt. 1975). An additional reason is that the inclusion of an item in apportionable income does constitute the taxation of that item or of its source. *See N.Y. ex rel. Cohn v. Graves,* 300 U.S. 308, 312 (1937); *Peck & Co. v. Lowe,* 247 U.S. 165 (1918); *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1910). In any event, it is clear that the UDITPA apportionment rules are well written within due process limits.

[23]For example, most of the corporations in the list at footnote nine of the *Mobil* dissent, 445 U.S. at 456, are not in the same kind of business as Mobil and are not controlled by Mobil. However, if Mobil's investments in the stock of these listed public utilities corporations were made by Mobil to insure sources of supply of energy for use in Mobil's petroleum business, there is a sufficient relationship between such stock investments and Mobil's petroleum business to support apportionability of the dividends received by Mobil from these investments.

[24]This conclusion is amply justified given the history of the taxation of intangibles, the abstract nature of a net income tax, the lack of any

Nothing in the due process portion of *Mobil* would invalidate the apportionment of dividends as "business income" as defined in UDITPA § 1(a).[25]

Various decisions of this Court, including those relied on in *Mobil*, support the foregoing interpretation of *Mobil*.[26]

Consistent with this interpretation, all of the apportionment cases relied on in *Mobil* and *Exxon, supra*, dealt with the unity of a single corporation and upheld the apportionment of the entire property, values or income attributable to or arising in connection with the unitary business of a single corporation. The same is true concerning many state income tax cases which have applied the unitary concept in determining the apportionability of income from intangibles.[27] Nothing in *Mobil* conflicts with these cases. This was affirmed beyond any question by *Exxon, supra*.

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fixed situs for intangible properties, and the fact that apportionment does not attempt to situs income to any source. *See* Dexter, *The Attribution of Net Income of Multistate-Multinational Corporations for State Taxes On or Measured By Net Income* in 1 Multistate Tax Comm'n Review No. 1 at 5 (Nov. 1981).

[25]Section 1(a) of UDITPA, as illustrated by the case of *Montana Dep't of Revenue v. American Smelting and Ref. Co.*, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed*, 434 U.S. 1042 (1978), simply requires a tie-in between the taxpayer's unitary business operations and the taxpayer's stock investments from which dividends are derived.

[26]*See, e.g., Exxon Corp. v. Department of Revenue*, 447 U.S. 207 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939); *Bass, Ratcliff & Gretton v. State Tax Comm'n*, 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 245 U.S. 113 (1920); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, *rehearing*, 166 U.S. 185 (1897).

[27]*See, e.g., International Harvester v. Department of Taxation*, 322 US. 435 (1944); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940); *Qualls v. Montgomery Ward*, 266 Ark. 207, 585 S.W.2d 18 (1979); *John Deere Plow Co. v. Franchise Tax Board*, 38 Cal.2d 214, 238 P.2d 569 (1951), *appeal dismissed*, 334 U.S. 939 (1952); *Appeal of W. J. Voit Rubber Co.*, 1 Cal. Tax Cas. Rep. (CCH) ¶ 12-402.872 (SBE May 12, 1964); *Albany International Corp. v. Halperin*, 388 A.2d 901 (Me. 1978); *W. R. Grace & Co. v. Commissioner of Revenue*, ___ Mass. ___, 393 N.E.2d 330 (1979); *Montgomery Ward & Co. v.*

The foregoing interpretation of the due process clause portion of *Mobil* is supported by the commerce clause portion of *Mobil*.[28] In holding that dividends were subject to apportionment within commerce clause limitations, this Court stated in Mobil:

> Taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained. See *Standard Oil Co. v. Peck*, 342 U.S. 382, 384 (1952). We find no adequate justification, however, for such a preference. . . . *The Court also has recognized that "the reason for a single place of taxation no longer obtains" when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. Curry v. McCanless*, 307 U.S. 357, 367 (1939). Emphasis added; (445 U.S. at 444-45).

Mobil then noted, 445 U.S. at 446, that "when the dividends reflect income from a unitary business, part of which is conducted in other States. . . . the income bears relation to benefits and privileges conferred by several States." and that "[t]hese are the circumstances in which apportionment is ordinarily the accepted method." *Id.* Clearly, the commerce clause portion of *Mobil* refers only to the utilization of intangibles in the unitary business of the payee taxpayer.

Commissioner of Taxation, 276 Minn. 479, 151 N.W.2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W.2d 612 (1965), *appeal dismissed*, 384 U.S. 718 (1966); *Montana Department of Revenue v. American Smelting and Ref. Co.*, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed*, 434 U.S. 1042 (1978); *F.W. Woolworth Co. v. Director of Division of Taxation*, 45 N.J. 466, 213 A.2d 1 (1965); *Champion International Corp. v. Bureau of Revenue*, 88 N.M. 411, 54 P.2d 1330 (1975); *Sperry Hutchinson Co. v. Department of Revenue*, 270 Or. 329, 527 P.2d 729 (1974); *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968*, 133 Vt. 132, 335 A.2 310 (1975); *F.W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972); *Gulf Oil Corp. v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958).

[28] Inasmuch as due process and commerce clause issues are interrelated, *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 353 (1944), disposition of the commerce clause issue in *Mobil* is relevant for due process purposes.

IV. To Condition the Constitutionality of the Inclusion of Income from Stock Investments Upon a Finding that the Investments are in Corporations Which Conduct a Unitary Business with the Investor is Illogical and Should Not be Read into Mobil.[29]

Reg. IV.1.(c)(4) of the Commission UDITPA regulations sets forth the following examples of apportionable dividend income under UDITPA:

> Example (ii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are business income.
>
> Example (iii): The taxpayer and several unrelated corporations own all of the stock of a corporation whose business operations consist solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing business. The dividends are business income.
>
> Example (iv): The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to

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[29]Although contrary to its due process argument, ASARCO concedes that, "There may be situations . . . in which it would be appropriate to focus only on the taxpayer's own activities, without regard to the underlying activities of the company paying the dividends" to determine the constitutionality of the apportionment of dividends. Appellant's Br. at 18 (footnote omitted). ASARCO fails to note, however, what constitutional standard could be employed to distinguish such situations from this case. We are aware of none except the unitary business principle.

current liabilities. In order to maintain an adequate bonding capacity the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are business income.

Example (v): The taxpayer receives dividends from the stock of its subsidiary or affiliate which acts as the marketing agency for products manufactured by the taxpayer. The dividends are business income.[30]

Although these examples are not exhaustive, they are obvious illustrations of investments in stocks made for purposes clearly associated with the taxpayer's unitary business operations.

The foregoing examples are not constitutionally distinguishable from Mobil's investment in ARAMCO stock and presumably its miscellaneous investments, the dividends of which were held apportionable in *Mobil*. In each instance, the controlling question is: Was the investment made in furtherance of the taxpayer's unitary trade or business? If it was, due process for apportionment purposes is satisfied.

V. Mobil Did Not Require the Court Below to Modify its Holding that the UDITPA Apportionment Factors, Without Modification, Constitutionally Apportioned ASARCO's Apportionable Income, Including Income from Its Stock Investments in Question,[31] Since ASARCO Has Failed to Establish that the Apportionment Results are Unreasonable.

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[30]7 Multistate Tax Comm'n Ann. Rep. app. J at 68 (1973-1974); Idaho Reg. 27.IV.1.(c)(4). The foregoing examples simply apply the regulation test for apportionability of dividends: "Dividends are business income where the stock with respect to which the dividends are received arises out of or was acquired in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the stock is related to or incidental to such trade or business operations." *Id.*

[31]Since ASARCO takes the position that only dividends from payor corporations, which conduct a unitary business with the payee, are subject to apportionment and since no such unitary business is here involved, ASARCO's argument in regard to modification of the UDITPA

Since Mobil did not contest the reasonableness of the Vermont three-factor apportionment formula in *Mobil*, this Court did not pass on this question. 445 U.S. at 434. However, *Mobil* does not change one *iota* ASARCO's burden to establish by clear and cogent evidence that the UDITPA apportionment formula, as applied in here, taxed any extra-territorial income or values of ASARCO.[32] The *Mobil* court reaffirmed this test when it noted that Mobil had not proved that its Vermont income tax liability was "out of all appropriate proportion to the business of Mobil transacted in that State [Vermont]." 445 U.S. at 437. Thus, the UDITPA formula is not required to be modified to conform to due process standards unless the formula, as applied, is shown to tax extra-territorial values or income, which is not the case here.

Notwithstanding this, ASARCO argues that there is something peculiar about income from stock which triggers a different due process test than the clear and cogent evidence rule to determine the validity of an apportionment result. ASARCO argues that the inclusion of dividends in apportionable income under the UDITPA three-factor formula is "inherently arbitrary" as a matter of due process. Appellant's Br. at 37. ASARCO premises this argument on analogy to the results obtained by the combined reporting method. However, this argument is based on the fallacious assumption that the dividends in question were received from corporations with which it conducts a unitary business. But, the court below found that the payee corporations were not conducting a unitary business with ASARCO. J.S. at 20a-22a. Therefore, ASARCO's reliance on "combined reporting" results and Justice Stevens' dissent in *Mobil*, is totally misplaced. Fur-

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apportionment factors (Appellant's Br. at 27-37) is irrelevant here. It is also irrelevant since Idaho permits and requires combined reporting. Thus, consistent with the unitary business principle, Idaho would apportion the combined net income of the unitary business in accordance with the combined factors of the unitary business as suggested by Justice Stevens in his dissent in *Mobil*. (445 U.S. at 461-62).

[32] *See, e.g., Exxon, supra*; *Moorman Mfg. Co. v. Bair, supra*; *Norfolk & Western Ry. Co. v. North Carolina*, 297 U.S. 682 (1936); *Hans Rees' Sons, Inc. v. North Carolina, supra.*

thermore, if a "combined reporting" result is the constitutional standard to determine the reasonableness of an apportionment formula where dividends are received from subsidiaries which conduct a unitary business with the dividend payee, then ASARCO should argue that the combined reporting standard controls to determine the reasonableness of the apportionment result in question. It does not do so. Neither does it proffer any evidence to show what a combined report would attribute to Idaho as compared to the apportionment results it here challenges. Rather, ASARCO agrees with the position of the appellant in *Chicago Bridge & Iron Company v. Caterillar Tractor Co., prob. juris. noted,* No. 81-349, that combined reporting is unconstitutional. Appellant's Br. at 31, n.25.

Nevertheless, ASARCO further argues that the payor's factors should be included in the denominator of the payee's factors in the ratio of the dividends to the current net income of the payors. Appellant's Br. at 27-37. It bases this argument, if otherwise relevant, on two invalid assumptions: First, that the apportionability of dividends, without apportionment factor adjustments, attributes more net income to the taxing state than "combined reporting." Second, that a "combined reporting" result is equivalent to the apportionability of dividend income that occurs when a portion of the payor's factors (a fraction representing the ratio of the payor's dividends to the payor's net income) are included in the denominator of the payee's factors.

The invalidity of ASARCO's first assumption (that the apportionability of dividends without apportionment factor adjustments attributes more income to the taxing state than "combined reporting") may be illustrated by the following hypothetical examples. Assume that Corporation A conducts a unitary business with its subsidiary Corporation B and assume the following:

Corporation A

	Everywhere	Idaho
Property	1,000	500
Payroll	2,000	2,000
Sales	4,000	—0—
Net operating income:		$300.00
Dividends from Corp B:		300.00
Total taxable income		$600.00

Corporation B

	Everywhere	Idaho
Property	500	100
Payroll	1,000	300
Sales	6,000	600
Net operating income:		$600.00
Income tax liability:		300.00
Net distributable income		$300.00*

*It is assumed that $300 is paid to discharge income tax liabilities and thus is not available for distribution as dividends. This is a reasonable assumption based on the combined net income tax rates of the federal government and the states as well as the prevailing rates in foreign countries.

Under the foregoing assumptions, if Corporation A's tax liability to Idaho is determined on a *separate entity basis* with the total distributable dividends included in apportionable income, its Idaho taxable income would be $300.00, computed as follows:

$$\left.\begin{array}{ccc} \text{Property} & \text{Payroll} & \text{Sales} \\ \frac{500}{1{,}000} & \frac{2{,}000}{2{,}000} & \frac{0}{4{,}000} \end{array}\right\} = \tfrac{1}{2} + 1 + 0 \div 3 = \tfrac{1}{2} \times \$600 = \$300.$$

If Corporation A's tax liability to Idaho is determined on the basis of a *combined report*, the Idaho taxable income would still be exactly $300, computed as follows:

Total combined net operating income = $900.00 (The $300.00 intercorporate dividend is eliminated in a "combined report.")

Idaho factors:

Property	Payroll	Sales	
500/1,500	2,000/3,000	0/10,000	= ⅓ + ⅔ + 0 ÷ 3 = ⅓ x $900 = $300.

While the foregoing example illustrates, based on the assumptions in the example, that there is an equivalence between separate entity reporting with dividends in apportioned income and "combined reporting" with intercorporate dividends eliminated, a variation in the factual assumptions demonstrates that equivalence between separate entity reporting and combined reporting would rarely occur. This can be illustrated by changing some of the factual assumptions in the foregoing example:

1. Assume Corp. A sells its products at cost to its subsidiary, Corp. B, so that (as was the case in *Mobil* for the two years in question) Corp. A had no taxable net operating income. The $900 total net operating income would then be attributable to Corporation B by "separate accounting." Under *separate entity reporting,* assuming Corp. A received the $450 of distributable income as dividends, this would result in apportioning $225 of Corp. A's income to Idaho (separate entity reporting factor of ½ x $450 = $225); under *combined reporting,* $300 would be apportioned to Idaho (combined reporting factor of ⅓ x $900 = $300).

2. Assume Corp. A attributes all the net operating taxable income to itself by separate accounting. It would thus realize $900 net operating income. Corp. B would have no profits out of which it could pay dividends to Corp. A. Corp. A would then have $450 total taxable income in the state on a separate entity basis (½ x $900 = $450) versus $300 computed on a "combined reporting" basis (⅓ x $900 = $300).

3. Assume Corp. B paid dividends of $450 to Corp. A ($150 out of previous undistributed earnings and profits). Corp. A's tax liability on a separate entity basis would be then $375 (½ x $750 = $375) to Idaho with dividends apportionable. This result, which is clearly different than the results in variations 1. and 2. above, further erodes appellant's position.

In sum, the above examples clearly illustrate that, contrary to ASARCO's argument, the results from apportionability of dividends without apportionment factor adjustments is not analogous to the results from "combined reporting."

ASARCO's second assumption, that an equivalence exists between a combined report and the inclusion of the payor's factors in the payee's denominator, is also without merit. Under the foregoing example, ASARCO's position is that a portion of Corp. B's factors (representing the ratio of Corp. B's dividends to Corp. B's income or one-half in above example) should be added to Corp. A's factors. In accordance with ASARCO's position, Corp. A's income tax liability to Idaho would be computed as follows: Corp. A's income equals $600.00. The ratio of Corp. A's Idaho factors compared to the total of Corp. A's factors everywhere plus one-half of Corp. B's factors everywhere is 2/5, computed as follows:

Property	Payroll	Sales	
500 / 1,250	2,000 / 2,500	0 / 7,000	= 2/5 + 4/5 + 0 = 6/5 ÷ 3 = 2/5

Idaho taxable income equals 2/5 x $600 = $240.

ASARCO's argument that inclusion of the payee's factors yields a result analogous to a "combined reporting" result is thus fallacious: A "combined report" result yields Idaho taxable income of $300 and ASARCO's method yields Idaho taxable income of only $240.

Following the format in the examples above, variations in the factual assumptions will further demonstrate the invalidity of ASARCO's claimed equivalence between the results of a combined report and the results from ASARCO's method of including the payor's factors in the payee's denominator:

1. If Corp. B's net operating income is assumed to be only $150, and dividends to A are thus reduced to $75, Corp. A's total taxable income would be $375 (including the dividends), and under ASARCO's proposal $150 would be attributable to Corp. A (2/5 x $375 = $150). This result is identical to complete exemption of Corp. B's $75.00 divi-

dends to Corp. A on a separate entity basis (½ x $300 of net operating income = $150).

2. If Corp. B's net operating income is assumed to be $100 and Corp. B's dividends to Corp. A are $50, Corp. A's liability to the taxing state would be $140 (2/5 x $350 = $140). Thus, the state loses $10 in income taxes by including Corp. A's dividends in its apportionable income as compared to completely exempting dividends and apportioning only the $300 net operating income on a separate entity basis.

In sum, tax consequences which follow from the apportionability of dividends have no direct relationship to the tax consequences of "combined reporting" and neither of these methods has the same tax consequences which follow from inclusion of a portion of the payor's factors in the denominator of the payee's apportionment formula if dividends are included in apportionable income. ASARCO's conclusion, that the inclusion of dividends in apportionable income is "inherently arbitrary" based on its argument in pages 27-37 of its brief, thus has absolutely no validity.

Because the *Mobil* Court was properly concerned with the validity of the apportionment results, this Court appropriately denied Mobil any relief in the absence of Mobil specifically raising this issue and proving its case in accordance with well recognized constitutional standards which have been carefully developed by this Court in numerous apportionment cases. ASARCO is here entitled to no more.[33]

In conformity with these standards, the drafters of UDITPA clearly recognized that the UDITPA

[33]We are not here suggesting that, on an appropriate factual showing under UDITPA § 18, the inclusion of dividends in apportionable income may not require an adjustment of the apportionment factors. Neither are we suggesting that due process considerations may not require the use of the "combined reporting" method for state income tax apportionment purposes where a unitary business is conducted by a group of affiliated corporations to test the reasonableness of an apportionment formula. However, the validity of apportionment results, irrespective of the classes of income included in apportionable income, cannot be determined by abstract arguments based on hypothetical circumstances.

apportionment formula may produce inequitable results. To meet this contingency, they included the relief provisions in UDITPA § 18.[34] However, as heretofore indicated, these relief sections can be invoked only by a proper factual showing by a party relying on its provisions. ASARCO has made no such showing; ASARCO chooses to proceed on the assumption that the apportionment of income from stock investments by the UDITPA three factor formula is "inherently arbitrary." Appellant's Br. at 37.

ASARCO premises this argument on two basic misconceptions in addition to its misplaced reliance on combined reporting results. First, it confuses the dividend income of the payee stockholders with the payor corporations' net taxable income for the current year. However, the "source" of dividends is the ownership of stock. ASARCO ignores the fact that stockholders and the corporations in which they own stock are distinct taxable legal entities.[35]

Secondly, ASARCO assumes that it is "inherently arbitrary" to attribute income from intangibles to the unitary business activities of the payee corporation by using the tangible apportionment factors found in UDITPA.[36] As heretofore indicated, UDITPA simply assigns corporate income which is derived from a unitary business to where that business is done as reflected by the location of the tangible properties, payroll and sales (receipts) of that business. Before income is subject to apportionment under UDITPA, irrespective of its character, UDITPA first requires that it be associated in a due process and economic sense with the total business operations, irrespective of where these operations are conducted. UDITPA then simply assigns this business income to the geographical locations where the business is done, as reflected by the location of the tangible property, payroll

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[34] *See* footnote 18, *supra*.

[35] The opinion of the court below and the authorities relied upon adequately address this argument, which merits no further comment here. (J.S. at 27a-29a). *Cf. Hawley v. Madden*, 232 U.S. 1 (1914); *Darnell v. Indiana*, 226 U.S. 390 (1912).

and sales (receipts) of the business. (This business consisted of the business operations of ASARCO and six affiliated corporations.) Thus, in ASARCO's case, its business income, which included its income in question, was apportioned to Idaho on the basis of the Idaho tangible property, payroll and receipts of the business (which included the business of six subsidiary corporations) compared to total tangible property, payroll and receipts of the business everywhere. This resulted in attributing to Idaho for the years in question approximately 2.5% of the business income of the business of ASARCO and its six affiliates which ASARCO conducted in part in Idaho. There is no reason to assume this result is "inherently arbitrary."

In the rehearing of *Adams Express Co. v. Ohio State Auditor, supra,* the Court specifically rejected this assumption in the context of an interstate utility *ad valorem* property tax case. In upholding the state's power to apportion the entire intangibles of a unitary business to the state based on a tangible property factor, the *Adams* Court decided that the situs of intangible property of a unitary business is "wherever its tangible property is located and its work is done." 166 U.S. at 223. In the context of a corporate privilege tax, this Court, in *Ford Motor Co. v. Beauchamp, supra,* reaffirmed this principle and gave constitutional due process support to the economic fact that intangibles related to a unitary business have a significant due process relationship to the entire unitary business and that they may be apportioned by a tangible apportionment factor to where the business is conducted. In *International Harvester v. Department of Taxation,* 322 U.S. 435 (1944) and *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435 (1940), this Court upheld the apportionment of dividends to Wisconsin based on the tangible factors of the payor corporations.

Following the holding of these decisions, to which UDITPA conforms, state courts have uniformly apportioned income from intangibles based on tangible ap-

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[16]*See* UDITPA § 9; I.C. § 63-3027(i).

portionment factors.[37]

Nothing in *Mobil*, conflicts with the apportionment of income from intangibles by using the tangible factors in the UDITPA apportionment formula so long as the tangible apportionment factors distribute the unitary income to where the unitary business is conducted. The concern in *Mobil* was limited to the circumstances where: (1) a unitary business was presumed to have been conducted by a group of corporations; (2) combined reporting was not permitted; and (3) the apportionment factors were limited to those of only one member of the unitary group. Although these circumstances may well trigger the need for apportionment relief in accordance with "combined reporting" standards, or comparable standards, such circumstances do not exist in this case. The Idaho Code specifically provides for "combined reporting." I.C. § 63-3027(s). "Combined reporting" was permitted in this case to the extent that ASARCO was found to have conducted a unitary business with affiliated corporations. Also, all of the tangible property, payroll, and receipts of the unitary combined group were included in the apportionment factors and the income from intangibles was included in the denominator of the sales factor.[38] No relevant evidence was introduced to establish that this apportionment result was unreasonable. Thus, ASARCO has failed to establish the unconstitutionality of the UDITPA apportionment formula as applied in this case.

VI. The Inclusion of Dividends of ASARCO from M.I.M. and Mexicana in Apportionable Income is in Conformity with Commerce Clause Limitations.

ASARCO argues that, on the basis of *Japan Line*

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[37]*See* cases cited in footnote 16, *supra*; *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N.W.2d 294 (1967); *Great Lakes Pipe Line Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W.2d 612 (1965); *F.W. Woolworth Co. v. Director of Division of Taxation*, 45 N.J. 466; 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958).

[38]*See* J.A. at 73a.

Ltd., supra, the commerce clause precludes the inclusion of its dividends from M.I.M. and Mexicana in apportionable income. This argument is based on at least six false assumptions.

ASARCO's first false assumption is that *Japan Line* is relevant to state income taxes. *Mobil* holds otherwise:

> Appellant's attempted analogy between this case and *Japan Line* strikes us as forced. That case involved ad valorem property taxes assessed directly upon instrumentalities of foreign commerce. As has been noted, the factors favoring use of the allocation method in property taxation have no immediate applicability to an income tax. (445 U.S. at 448).

The second false assumption is that the state income tax system is not independent of, and in addition to, the federal system. Yet, in *Mobil,* this Court noted:

> Concurrent federal and state taxation of income, of course, is a well-established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States. (*Id.*).

Constitutionally, since states are neither required to give either a credit nor a deduction for any federal income taxes, it is inconceivable that they should somehow be required to take into account a federal income tax credit which is allowed for withholding taxes on dividends paid to a foreign country by the dividend payor corporations.

The third false assumption is that there is an established international policy which prevents any duplicate taxation of net income between nations and that the inclusion of dividends from "foreign sources" conflicts with this policy. No such policy exists.[39]

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[39]*See, e.g.,* Hadari, *Tax Treaties and Their Role in Financial Planning of the Multinational Enterprise,* 20 Am. J. Comp. Law 111 (1972) and authorities cited therein. The author there concludes:

> Multiple taxation is the natural result of the circulation of income from the foreign subsidiary . . . to the parent corporation, and from it to the shareholders all over the world.
>
> . . . .
>
> Until countries significantly elaborate their tax treaty programs, we must agree with Professor Raymond Vernon's

ASARCO's fourth false assumption is that ASARCO, unlike Mobil in *Mobil*, has established that its dividends have in fact been subjected to international double taxation. As the court below properly concluded, the record is void of any such evidence. Citation of isolated provisions of foreign tax laws is not proof of multiple taxation here any more than it was in *Mobil*. J.S. at 32a.

The fifth false assumption of ASARCO is that the practice of crediting low-rate foreign withholding taxes on dividends for federal tax is somehow a justification for the exclusion of these dividends from a state tax base[40] and that it evidences an international policy to source dividends to the country of the payor corporation. This hardly squares with the low rates on withholding taxes which are contained in tax treaties and otherwise.[41] These low rates would appear to, in substance, "source" dividends primarily in the country of the dividend recipient.

ASARCO's sixth false assumption is that the inclusion of dividends in apportionable income is the taxation of "foreign source" income. The fact is, as recognized by this Court in *Mobil, supra*, and *Moorman Mfg. Co., supra*, that an apportionment formula does not attempt to "source" net income geographically. In comparing apportionability of income by the unitary business principle with the sourcing of income by separate

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conclusion that "Tax payments made by multinational enterprises are a matter of bookkeeping, chance, and the vigilance of national tax authorities." (*Id.* at 144-45; footnotes omitted).

[40]Given the low rate of foreign withholding taxes on dividends as compared to normal tax rates of the country in which the payor corporation is located, ASARCO offers no solution as to how the states could devise their tax systems to prevent any so-called "double taxation" to conform to ASARCO's construction of the commerce clause. (Appellant's Br. at 45-48).

[41]For example, Art. 10 of the Organization for Economic Cooperation and Development (OECD) 1963 Draft Double Taxation Convention on Income and Capital prescribes a 5% rate of withholding on dividends paid to a corporation which owns at least 25% of the capital of the dividend payor corporation. This represents a nominal rate as compared to general rates of taxation by the principle nations of the world.

accounting, ASARCO is attempting to compare the uncomparable.

CONCLUSION

Apart from its erroneous interpretation of *Mobil* and *Japan Line*, ASARCO has cited no case that remotely supports its novel argument that UDITPA, as interpreted and applied in this case, is unconstitutional under either the due process clause or commerce clause. Therefore, it is respectfully submitted that this Court should affirm the judgment of the Idaho Supreme Court.

Respectfully submitted,

/s/_____

WILLIAM D. DEXTER
Counsel for Amicus Curiae

State of Missouri
JOHN ASHCROFT
Attorney General
Box 899
Jefferson City, MO 65102

State of Montana
ELLEN FEANER
Director of Revenue
Montana Dept. of Revenue
Mitchell Bldg.
Helena, MT 59601

State of Nebraska
PAUL L. DOUGLAS
Attorney General
2115 State Capitol Bldg.
Lincoln, NE 68509

State of New Hampshire
GREGORY H. SMITH
Attorney General
State House Annex, Room 208
Concord, NH 03301

State of New Mexico
JEFF BINGAMAN
Attorney General
Bataan Bldg.
P.O. Box 1508
Santa Fe, NM 87501

State of North Carolina
RUFUS L. EDMISTEN
Attorney General
M. C. BANKS
Deputy Attorney General
P.O. Box 629
Raleigh, NC 27602

State of North Dakota
ROBERT O. WELFALD
Attorney General
ALBERT R. HAUSAUER
Asst. Attorney General
State Capitol 8th Floor
Bismarck, ND 58501

State of Oregon
DAVE FROHNMAYER
Attorney General
100 State Office Bldg.
Salem, OR 97310

State of Utah
DAVID L. WILKINSON
Attorney General
236 State Capitol
Salt Lake City, UT 84114

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No. 80-2015

IN THE

Supreme Court of the United States

October Term, 1981

ASARCO INCORPORATED (formerly AMERICAN SMELTING AND REFINING COMPANY),
Appellant,

v.

IDAHO STATE TAX COMMISSION,
Appellee.

On Appeal from the Supreme Court of Idaho

BRIEF OF AMICUS CURIAE STATE OF VERMONT IN SUPPORT OF APPELLEE'S BRIEF

JOHN J. EASTON
Attorney General
State of Vermont

PAUL P. HANLON
Deputy Commissioner and General Counsel
Vermont Department of Taxes
P. O. Box 694
Montpelier, Vermont 05602
802-828-2805

Counsel for Amicus Curiae

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BRIEF OF AMICUS CURIAE STATE OF VERMONT IN SUPPORT OF APPELLEE'S BRIEF

INTRODUCTORY STATEMENT

This brief is submitted by the State of Vermont as amicus curiae in support of the Appellee. An identical brief has been submitted in support of the Appellee in *F. W. Woolworth Co. v. Taxation and Revenue Department of the State of New Mexico, prob. juris. noted,* No. 80-1745 (U.S. Oct. 5, 1981).

STATEMENT OF INTEREST

The State of Vermont imposes a tax on the net income of corporations doing business within the state. VT. STAT. ANN. TIT. 32, §5832 (1981). Vermont net income is calculated by using the current federal definition of taxable income, with some adjustments. *Id.* §5811(18). Because federal taxable income includes dividends from a corporation's foreign subsidiaries, such dividends are also included in Vermont's tax base.

When a corporation operates in other jurisdictions as well as in Vermont, an apportionment formula is applied to the corporation's income to determine "a fair and equitable portion" to be taxed by Vermont. *Id.* §5833. Vermont's apportionment formula is not automatically adjusted when dividends from foreign subsidiaries are received by a corporation taxed in Vermont, although the Commissioner of Taxes may modify the formula if it does not fairly represent the extent of a corporation's business activities in the state. *Id.* §5833(b).

Vermont has a direct and significant interest in the outcome of this case because it would be barred from including certain dividends in its tax base, or, alternatively, would be forced to modify its apportionment formula in certain cases, if the Appellant's Due Process and Commerce Clause arguments are upheld. Vermont's brief will discuss only the propriety, under the Due Process Clause, of including dividends in apportionable income and the necessity of modifying the apportionment formula if dividend income is included.

SUMMARY OF ARGUMENT

When a state imposes a tax on the income of a multinational corporation doing business within its borders, the only valid question under the Due Process Clause is whether the tax imposed is out of all proportion to the benefits conferred on the corporation by the state. The application of an apportionment formula to a corporation's operating and investment income is a reasonable method of apportioning profits among the states. Dividends, as part of a corporation's investment income, may be considered in ascertaining the profitability of a corporation and are apportionable under long-standing due process analysis.

As long as an apportionment formula produces a tax reasonably related to the activities of a corporation within the state, no modification to the formula to take into account the property, payroll and sales factors of a dividend payor is justified under the Due Process Clause.

ARGUMENT

I. There is no due process bar to the inclusion of dividends in the taxable income of a corporation doing business within a state so long as the income is fairly apportioned.

A state may tax the income of a corporation engaged in interstate commerce provided a minimal connection or "nexus" exists between the taxing state and the interstate activities of the corporation. *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 219 (1980). The nexus requirement is met if the corporation avails itself of the substantial privilege of carrying on

business within the state. *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 437 (1980) (hereinafter cited as *Mobil*). Once nexus is established, "[s]o far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state." *Norfolk & Western Railway Co. v. Missouri State Tax Commission*, 390 U.S. 317, 325 n.5 (1968) (quoting *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949)).

It is well established that, when a corporation does business within a state, the corporation receives the substantial benefits of a state's services, including "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. at 228 (citations omitted). The application of a reasonable apportionment formula to the income of an interstate corporation ensures attribution of a portion of income to each state in direct relation to the corporation's activities within the state. Such an attribution is reasonable in light of the privileges afforded by the state to the operating corporation and is a guarantee that the proper value is placed on the state's services in relation to the corporation's profitability.

The proper focus of due process analysis is not what goes into the corporation's taxable income, but what the results are after a state's apportionment formula has been applied to that income. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 273-74 (1978). The source of a particular item of income is unimportant; the test is whether the tax assessed after application of the apportionment formula is in proportion to the benefits con-

ferred by the state. *Mobil*, 445 U.S. at 437; *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931).

In Vermont's view, both operating and investment income contribute to the overall corporate enterprise.[1] Where a portion of the total corporate business is being conducted in Vermont, it is appropriate to include all income in the tax base as long as it is properly apportioned. *See Mobil Oil Corp. v. Commissioner of Taxes*, 136 Vt. 545, 552, 394 A.2d 1147, 1151 (1978), *aff'd*, 445 U.S. 425 (1980); *F. W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 549, 298 A.2d 839, 841 (1972).

When a state extends its services to a corporation, it is providing an atmosphere in which a corporation may prosper, whether by extensive management of operating assets, manipulation of a market for its goods, or reinvestment of its profits. A corporation's income may include, in addition to operating income, long- and short-term investment income. Operating income represents the current profits of the company's active business, while investment income is a result of a temporary or long-term diversion of operating profits to investments available to, or supportive of, the operating business.

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1 Vermont and twenty-one other states employ the federal definition of income as the starting point for their corporate income taxes. Federation of Tax Administrators, Research Memorandum 527, Federal Starting Point Laws: State Personal and Corporate Income Taxes (November, 1981). The use of the federal income definition provides administrative convenience to the states because it is widely accepted and refined by many rulings, regulations and court opinions. Adherence to the federal definition results in consistency of treatment at the state level, offering predictability and uniformity, as both intrastate and interstate corporations will include the same items of operating and investment income.

When a state chooses to include an interstate corporation's investment income in determining its apportionable income, the state is not taxing extraterritorial values. *See Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-21 (1920). The investment income represents the income of the corporation which holds the investment; its inclusion is not an attempt by the state to tax the income of the operating business which produces the income for the investor. For example, inclusion in income of interest earned on bank certificates of deposit measures the investor's profitability; such inclusion is not an attempt to reach the bank's income. Similarly, the inclusion of dividends from a foreign corporation in the income of a corporate shareholder measures the investment profit of the shareholder; the inclusion is not an attempt to tax the foreign corporation's income.

While the Court in *Mobil* specifically reserved decision on the apportionability of dividends where there is no underlying unitary business as the source of the dividends, there was no real discussion in the opinion of the effect investment income has on the overall operations of a business. *Mobil*, 445 U.S. at 442. This Court has recognized that intangible property held by a multistate corporation contributes to the overall business carried on within each state:

> Financial power inherent in possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. . . . The weight, in determining the value of the intrastate privilege, given the property

> beyond the state's boundaries, is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state.

Ford Motor Co. v. Beauchamp, 308 U.S. 331, 336 (1939).

The Court might well find that the "business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing state," *Mobil*, 445 U.S. at 442, and still find that the *dividends themselves* are used by the recipient in its business and are fully apportionable. As long as the results produced by an apportionment formula are fair, the amounts included in the apportionable base are beyond criticism under the Due Process Clause.

II. The inclusion of dividends in pre-apportioned income does not require adjustment of a state's apportionment formula to reflect the property, payroll and sales of the dividend payor.

As discussed above, due process analysis examines the privileges and protections invoked by a corporation when it does business within a state and what that state can ask in return by way of a corporate income tax. Both operating and investment income may be considered in measuring the tax a corporation should pay to a state, as long as the resulting tax bears a rational relationship to the activities conducted within the state. Since an apportionment formula spreads investment income among taxing states on the basis of operating factors (property, payroll and sales), the resulting tax is *per se* a reasonable extraction by each state.

A demand that the property, payroll and sales factors of a dividend-paying corporation be reflected in a state's apportionment formula is really a repetition of the argument that dividends should be excluded from income. If the source of income has no due process bearing because the result of apportionment is what is to be considered, then the factors of the dividend-paying corporation are irrrelevant unless the result of apportionment is unfair. Showing that a corporation would pay less tax if the factors of the dividend-paying corporation were considered does not prove that the apportionment formula is unfair; an inclusion in income of interest from a bank certificate of deposit would not call for a modification of an apportionment formula to reflect the bank's factors, although such an action would surely reduce the operating company's tax. What must be shown is that the tax is out of all proportion to the benefits received. *Moorman Manufacturing Co. v. Bair*, 437 U.S. at 274; *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U.S. at 135. The Appellant has failed to show that the tax imposed exceeded the benefits conferred and was unfair. Absent proof of such unfairness, the apportionment formula must be upheld.

CONCLUSION

The Due Process Clause requires only that a corporation have a minimal connection with a state before a tax on income may be imposed. The apportionment of a multistate corporation's income guarantees that the tax imposed will be reasonably related to the activities of the corporation within the state. Dividend income may be included in the income subject to apportionment because it reflects the profits of the entire corporate enterprise

which is carried on, in part, within the state. No modification of the apportionment formula is required where dividends are included in apportionable income unless the formula produces an unfair result, out of all proportion to the benefits received by the operating company.

Dated at Montpelier, Vermont, this 15th day of January, 1982.

Respectfully submitted,

JOHN J. EASTON
Attorney General of Vermont

PAUL P. HANLON
Deputy Commissioner and General Counsel
Vermont Department of Taxes
P. O. Box 694
Montpelier, Vermont 05602

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 1982, three copies of this brief were mailed, with first class postage prepaid, to George W. Beatty, 1200 18th Street, N.W., Washington, D.C. 20036, Counsel for Appellant, and to Theodore V. Spangler, Jr., Post Office Box 36, Boise, Idaho 38722, Counsel for Appellee. I further certify that all parties required to be served have been served.

PAUL P. HANLON
Deputy Commissioner and General Counsel
Vermont Department of Taxes
P. O. Box 694
Montpelier, Vermont 05602

Counsel for Amicus Curiae
State of Vermont